Supreme Court, U.S.
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No. 10-116

IN THE

Supreme Court of the United States

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT AND WILLIAMSON LAND CO.,

Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal reclamation law governs the rights and responsibilities of landowners receiving water for irrigation from federal reclamation projects under contracts with the Bureau of Reclamation. *See generally* 43 U.S.C. §§ 371 *et seq*. It has long been a principle of reclamation law that "the Government's 'ownership' of the water rights" in project water is "at most nominal; the beneficial interest in the rights confirmed to the Government reside[s] in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Nevada v. United States*, 463 U.S. 110, 126 (1983). As a consequence, once landowners fulfill their contractual obligation to repay the cost of constructing the project works, they obtain a permanent water right and other important entitlements under reclamation law. *See* 43 U.S.C.§§ 372, 390mm, 431, 541. The question presented is:

Whether the Government may deprive landowners of the ability to acquire a permanent water right and other reclamation law entitlements by limiting landowners to perpetually extending ten-year "water utility" contracts under 43 U.S.C. § 485(e).

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in this case are the Grant County Black Sands Irrigation District and the Williamson Land Co.

The defendants in this case are the United States Bureau of Reclamation; Dirk Kempthorne, in his official capacity as Secretary of the Interior; Robert W. Johnson, in his official capacity as Commissioner of the Bureau of Reclamation; J. William McDonald, in his individual capacity and in his official capacity as Regional Director of the Pacific Northwest Region of the Bureau of Reclamation.

CORPORATE DISCLOSURE STATEMENT

The Williamson Land Company has no parent corporation and no publicly held company owns more than ten percent of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Grant County Black Sands Irrigation District and Williamson Land Co. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 579 F.3d 1345. The district court's opinion (Pet. App. 39a-52a) is reported at 539 F. Supp. 2d 1292.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2009. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on February 17, 2010. Pet. App. 53a-54a. The Chief Justice extended the time for filing the petition until July 16, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Reproduced in an appendix to this brief are the relevant provisions of (1) the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388; (2) the Act of August 9, 1912, Pub. L. No. 62-256, 37 Stat. 265; (3) the Reclamation Project Act of 1939, Pub. L. No. 76-260, 53 Stat. 1187; (4) the Act of July 2, 1956, Pub. L. No. 84-643, 70 Stat. 483; and (5) the Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261.

STATEMENT OF THE CASE

This case involves the rights of farmers receiving water for irrigation from federal reclamation projects. Petitioners represent landowners with so-called "Section 9(e)" contracts with the U.S. Bureau of Reclamation to receive water from a federal reclamation project in the State of Washington. They filed suit challenging the Bureau's refusal to permit them to obtain permanent water rights and other benefits under federal reclamation law.

I. Statutory Background

1. In the beginning of the last century, Congress authorized the federal government to create massive reclamation projects in the western United States in order to capture and divert available water for publicly beneficial uses, including irrigation. The Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, directed the Bureau of Reclamation to identify feasible projects and enter into contracts with individual farmers taking water from the project (project landowners) for the repayment of the construction costs. *See id.* §§ 2-4.

Rather than empowering the Bureau to determine how to allocate water rights among project landowners, Congress directed that distribution of project water would be in accordance with state law. *See* 43 U.S.C. § 383. Consistent with basic water law principles in the western states -- which generally allocate water rights in accordance with the order in which users first appropriate water and put it to beneficial use – the statute further provided that the "right to the use of water acquired under the

provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. However, in order to encourage family farming and to prevent land speculation, Congress precluded the Bureau from providing water to any "tract exceeding one hundred and sixty acres to any one landowner." *Id.* § 431.

Under this scheme, the Government obtained water rights from the states in order to establish the projects, but ultimately was required to transfer the water, and water rights, to landowners who complied with the acreage limitation and put the water to beneficial use in irrigation. *See generally Nevada v. United States*, 463 U.S. 110 (1983). Thus, this Court has explained, "the Government's 'ownership' of the water rights [is] at most nominal; the beneficial interest in the rights confirmed to the Government reside[s] in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Id.* at 126.

2. Congress originally contemplated that the cost of building the projects would be repaid by the project landowners over ten years. *See* 43 U.S.C. §§ 419, 461; *Swigart v. Baker*, 229 U.S. 187 (1913). But over time, it became clear that farmers would be unable to make those payments, particularly in tough economic times. Accordingly, Congress amended the Act to allow the Government greater flexibility in setting repayment terms. Congress extended the repayment period to 20 years in 1914, and to 40 years in 1926. *See* 43 U.S.C. §§ 423e, 475. It required, however, that annual

payments under new contracts also cover the operation and maintenance costs of the system. *Id.* § 492.[1]

In 1939, Congress again amended the Act to provide the Government even further flexibility. The amendment established two new forms of contracts that have become known as "Section 9(d)" and "Section 9(e)" contracts. Under Section 9(d), the Government was empowered to contract with an irrigation district to repay construction costs over a period of up to forty years (along with annual operation and maintenance costs). 43 U.S.C. § 485h(d). Under Section 9(e), the Government was permitted to enter into "either short- or long-term contracts to furnish water for irrigation purposes." *Id.* § 485h(e). The amendment provided that a Section 9(e) contract

> shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of

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[1] Although Congress allowed the Government to increase operation and maintenance charges to reflect rising operating expenses over the years, it prohibited any increase in construction charges (absent the consent of the affected water users) once those charges were set and officially announced. *See id.* § 469-70.

> the cost of construction of works connected with water supply and allocated to irrigation.

Id.

3. The Government construed Section 9(e) to permit a fundamental revision of the purposes of federal reclamation, converting the Bureau of Reclamation into a public utility that retained rights to the water it reclaimed, while giving temporary use of the water to farmers who could never thereafter payoff the construction costs and obtain a permanent right to the water as their own. *See* Pet. App. 15a; H.R. Rep. 84-1754, at 2 (1956).

Congress responded to the potential abuse of Section 9(e) contracts in 1956, enacting what is now codified at 43 U.S.C. §§ 485h-1 to 485h-5. The amendment required that in "any long-term contract hereafter entered into under" Section 9(e), the Government must offer farmers a series of rights, including the right to renew the contract upon its expiration, the right to convert the contract to a Section 9(d) contract, the right to have payments made in excess of operation and maintenance costs credited toward repayment of the construction costs, and the right to obtain a permanent water right once those construction costs have been repaid. *See id.* §§ 485h-1(1), (2), (3), (4); 485h-4. The amendment defined a "long-term contract" as "any contract the term of which is more than ten years." *Id.* § 485h-3.

II. Factual And Procedural Background

The principal controversy in this case is whether petitioners are entitled to the benefits afforded

landowners with repayment contracts or long-term Section 9(e) contracts under the 1956 amendment.

1. Petitioners represent 85 farmers within the Columbia Basin Project in central Washington State. *See* Pet. App. 42a; *see also Flint v. United States*, 906 F.2d 471, 473 (9th Cir. 1990) (describing history of the project). At the time the project was constructed, though petitioners owned project lands, it was believed too expensive to extend the planned facilities to irrigate petitioners' land. Consequently, the Government has not yet built irrigation canals or other distribution systems to petitioners' properties. However, water from other project facilities and lands seeped into the soil and migrated toward petitioners' land underground. The introduction of the pivot sprinkler in the 1960s, together with the raised water table resulting from project seepage, subsequently made irrigation of petitioners' land possible.

At their own expense, petitioners sunk wells to capture the seepage for irrigation. When the State of Washington recognized the United States' claim to the seepage waters in 1973, it required petitioners to obtain both a state permit and a contract with the Bureau of Reclamation to use the water. Starting in 1975, the Government offered petitioners Section 9(e) contracts with an initial term of 10 years, subject to automatic extension without notice provided that the state permit has been extended for a similar period. Pet. App. 3a. The State of Washington did, in fact, extend petitioners' permits and in 1983 made the permits permanent (subject only to modification or cancellation "at any time for good cause," Pet. App. 3a (quoting Wash. Admin. Code 173-134A-080(2)(i))).

Consequently, petitioners have been operating under perpetually extending Section 9(e) contracts for approximately 35 years.

Those contracts require petitioners to pay essentially the same rates as would be charged under a Section 9(d) contract. First, even though petitioners pump seepage water through their own equipment, at their own expense, they are charged a variable annual fee for operation and maintenance equal to 75% of the fee charged to farmers elsewhere in the project who obtain water through irrigation canals and other works operated by the Government. *See* Pet. App. 3a; *Flint*, 906 F.2d at 474 n.2. Second, the Government includes a fixed charge of $1.70 per acre "for participation in Project construction repayment." Pet. App. 3a; *see also Flint*, 906 F.2d at 473 (explaining that the Government imposes "an annual charge based on [petitioners'] acreage to offset the cost of construction of the project"). The Government arrived at that figure through the same amortization method it uses to calculate construction repayment costs for 9(d) contracts elsewhere in the Project. Pet. App. 23a (amortization for Section 9(e) contracts); C.A. J.A. 351-53 (amortization for Section 9(d) contracts).

Although petitioners are paying charges comparable to those paid by other farmers in the project with Section 9(d) contracts, and have been paying those charges for more than a quarter century, the Government has recently taken the position that petitioners' contracts are simply short-term water rental contracts not eligible for any of the ordinary benefits of reclamation law, including the opportunity to obtain a permanent water right or any

of the entitlements specifically provided for long-term Section 9(e) contracts in the 1956 amendment.[2]

2. In 2006, petitioners brought this action seeking injunctive and monetary relief against the Bureau and its officials in the Eastern District of Washington. The district court dismissed the complaint, accepting the Government's position that petitioners held only "short-term water service contracts" and therefore are not entitled to any of the benefits of long-term Section 9(e) or other repayment contracts under the Act. Pet. App. 46a-50a.[3]

Because petitioners sought to recover part of their overcharges under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), the appeal fell within the jurisdiction of the Federal Circuit. *See* Pet. App. 5a-9a. That court affirmed. The court first held that petitioners' contracts did not fall within the scope of the 1956 amendment's protection for "long-term" Section 9(e) contracts because, although they had

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[2] The Government has long subjected petitioners to the obligations attendant repayment contracts, including the pricing and acreage limitations of the 1982 Reclamation Reform Act (RRA). *See* Pet. App. 34a. It was only recently, when petitioners began requesting the benefits that come with the burdens of reclamation law, that the Bureau denied that petitioners were operating under repayment contracts.

[3] The district court concluded that because petitioners failed to state a claim under the reclamation laws, "they are not entitled to an [Administrative Procedures Act] waiver of sovereign immunity." Pet. App. 50a. The court of appeals explained, however, that the district court improperly conflated the merits of petitioners' claims with its jurisdiction to hear them. Pet. App. 5a n.1.

been repeatedly extended without action by the parties for more than 35 years, their initial nominal term was for ten years, and the statute defines "long-term contract" to mean any contract "the term of which is more than ten years." Pet. App. 18a (quoting 43 U.S.C. § 485h-3).

The court of appeals next rejected petitioners' argument that even setting aside the 1956 amendment, they are entitled to repayment rights because their Section 9(e) contracts – as a matter of statutory obligation and Government practice – impose a charge to recover construction costs of the project. Pet. App. 25a-33a. The court of appeals acknowledged that Section 9(e) requires the Government to assess petitioners a "fixed charge" that is set in "due consideration . . . to that part of the cost of construction of works connected with water supply and allocated to irrigation." Pet. App. 27a-28a (quoting 43 U.S.C. § 485h(e)). And the court did not dispute that in implementing this mandate, the Government has assigned to petitioners the same construction charge it would apply to a Section 9(d) repayment contract. *See* Pet. App. 23a. But it nonetheless held that petitioners' Section 9(e) contracts provided none of the basic repayment benefits afforded other farmers paying nearly the same charges under Section 9(d) contracts.

The court began by noting that the first sentence of Section 9(e) states that "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d) . . . the Secretary . . . may" enter into a Section 9(e) contract. Pet. App. 26a (quoting 43 U.S.C. § 485(e)). Rather than construing this sentence to permit the Secretary to enter into a

repayment contract pursuant to subsection (e) rather than subsection (d), the court of appeals read the sentence to imply that Section 9(d) establishes a form of repayment contract, and Section 9(e) does not. Pet. App. 26a. The court further viewed the 1956 amendment as ratifying the general idea that Section 9(e) represented a dramatic departure from prior reclamation principles. Pet. App. 26a, 29a-31a. By providing enumerated rights for "long-term," but not "short-term," Section 9(e) contracts, the court presumed that Congress intended to deprive holders of short-term contracts of the benefits of repayment. Pet. App. 29a-31a.

Finally, the Federal Circuit concluded that petitioners' Section 9(e) contracts do not fall within the statutory definition of a "repayment contract." The statute defines "repayment contract" as "any contract providing for payment of construction charges to the United States." 43 U.S.C. § 485a(e). Although the court acknowledged that petitioners pay construction-related charges under Section 9(e), it concluded that those charges do not count as "construction charges" within the meaning of the statutory definition. Pet. App. 27a-28a.

3. The court of appeals subsequently denied petitioners' petition for rehearing and rehearing en banc. This petition followed.

REASONS FOR GRANTING THE WRIT

It has been a fundamental principle of reclamation law from the beginning that the United States does not own the water it collects, but rather the water becomes the property of the landowners who appropriate it and put it to beneficial use in irrigation. For almost as long, the Government has resisted this principle, attempting to arrogate to itself the power to decide who should receive project water, how much, and for how long. This Court has repeatedly been required to intervene to restore the statutory order Congress intended, and should do so again here. The decision below sanctions the Government's ability to prevent farmers who appropriate and put project water to beneficial use from ever acquiring a permanent right to that water, through the expedient of limiting certain project landowners to what the Government views as simply short-term "water utility" contracts that impose the costs of ordinary repayment contracts, but provide few of the benefits. That decision cannot be squared with the statute, the decisions of this Court, or the decisions of other courts (including the Washington Supreme Court, the jurisdiction in which this case arises). Moreover, the decision will have broad implications for water users throughout the West. This Court's review is required.

I. The Court Of Appeals' Decision Is In Conflict With Fundamental Principles Of Reclamation Law, The Text Of The Reclamation Act, And The Decisions Of This And Other Courts.

The first Reclamation Act declared in no uncertain terms that the only criteria for obtaining a water right in project water is that the landowner appropriate the water and put it to beneficial use on his project lands. Contrary to the court of appeals' decision, nothing in the subsequent history of reclamation law has departed from this foundational principle.

A. The Federal Circuit Disregarded The Foundational Principle Of Reclamation Law That Project Landowners Acquire A Water Right Through Appropriation And Beneficial Use Of Project Water.

The Reclamation Act of 1902 disavowed any claim that the United States was displacing the authority of the states to allocate water rights to their citizens. *See* 43 U.S.C. § 383; *California v. United States*, 438 U.S. 645, 667 (1978). Instead, consistent with state water law, the statute declared that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372. The Government's actions, and the Federal Circuit's opinion, cannot be reconciled with this central command of federal reclamation law.

1. In the century since the first Reclamation Act, Congress has reaffirmed the basic principle that

landowners' rights to project water are established by state law and in accordance with the principle of beneficial use. *See, e.g.*, Act of August 9, 1912, Pub. L. No. 62-256, § 1, 37 Stat. 265, 266 (codified at 43 U.S.C. § 541); Act of July 2, 1956, Pub. L. No. 84-643, § 4, 70 Stat. 483, 484 (codified at 43 U.S.C. § 485h-4). Nonetheless, the Government has repeatedly attempted to evade this restriction on its discretion and authority, requiring correction by this Court and others on a number of occasions.

a. For example, in *Ickes v. Fox*, 300 U.S. 82 (1937), this Court rejected a claim quite similar to the one made by the Government in this case. Landowners had appropriated and put to beneficial use an average of 4.84 acre-feet of project water per year. *Id.* at 91-92. In order to finance a new project nearby, the Government declared that going forward, landowners would be restricted to 3 acre-feet of water, but could rent additional water from the Bureau for an extra charge. *Id.* at 92-93. Thus, as in this case, the Government asserted the right to "force and coerce" landowners in Washington State to "sign water-rental applications or be deprived of a portion of the water owned by them" by virtue of their prior appropriation and beneficial use. *Id.* at 92. And as in this case, the Government argued that it was entitled to use water rental contracts in order to retain ownership of the rights in project water. *Id.* at 96 (describing Government's claim that "the United States is the owner of the water" and that the landowners' "claims rest entirely upon executory contracts").

"The fallacy of th[at] contention," this Court declared, "is apparent." *Id.* at 96. The Court

explained that the Government's appropriation of water for the project "was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners." *Id.* at 95. As a consequence, "the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works." *Id.* "The government was and remained simply a carrier and distributor of the water . . . , with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works." *Id.* The obligation to pay those charges, the Court explained, did not delay the landowners' acquisition of a water right, but rather operated as "a lien upon the lands and the water rights appurtenant thereto – a provision which in itself imports that the water rights belong to another than the lienor, that is to say, to the landowner." *Id.*

In *Ickes*, this Court ultimately decided only whether the suit against the Secretary of the Interior could go forward based on the allegations in the complaint, *see id.* at 96-97, but later that same year, the Washington Supreme Court held that the Government's scheme was illegal. In *Lawrence v. Southard*, 192 Wash. 287 (1937), the court explained that under settled state law, "the only consideration required by the state for the use of the water for irrigation or agricultural purposes is the beneficial application of the water upon the land for the production of crops." *Id.* at 300. "As soon as this was accomplished . . . the right to the use of those waters was appropriated by the owner . . . and he and his successors became entitled to the quantity of water

appropriated by the then owner." *Id.* Thus, as soon as the landowner applied more than 3 acre-feet of water to beneficial use on his land, he "acquired a prescriptive right which vests title in [him] as completely as if it were conveyed by deed." *Id.* at 302. As a consequence, the Government's insistence that the landowner could obtain water in excess of 3 acre-feet only through a water rental contract was "a nullity." *Id.* at 300-301.

The D.C. Circuit subsequently reached the same conclusion in further proceedings after the remand from this Court in *Ickes*. *See Fox v. Ickes*, 137 F.3d 30 (D.C. Cir. 1943).

b. In *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the United States again claimed ownership of water in a reclamation project, and this Court once again rejected that claim. The case involved a suit to apportion water rights in the North Platte River among the states of Nebraska, Wyoming, and Colorado. The United States intervened, claiming to own all unappropriated water in the river. *Id.* at 611. But, this Court explained, the water the Government claimed had already been distributed to landowners through reclamation projects. *Id.* at 613. Repeating its admonition from *Ickes*, the Court explained that the "property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals.... The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use." *Id.* at 614. "Though we assume arguendo that the United States did own all of the unappropriated water, the appropriations under state law were made

to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act." *Id.* at 615. "The right so acquired" by the landowners, the Court declared, was "definite and complete." *Id.*

c. Some thirty years later, this Court was required once again to reject the United States' claim that it was not bound by state law in distributing project water. In *California v. United States*, 438 U.S. 645 (1978), the Government requested a declaratory judgment that it was not bound by conditions imposed by the State of California regarding the use of waters appropriated for the Central Valley Project. *Id.* at 648. After an extensive review the history of the 1902 Reclamation Act, Chief Justice Rehnquist explained that "it is clear that state law was expected to control in two important respects." *Id.* at 665. First, "the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *Id.* "Second, once the waters were released from the Dam, their distribution to individual landowners would again by controlled by state law." *Id.* The Court thus rejected dictum in some prior cases that had suggested that the Government was not "bound by state law in disposing of water under the Project," *id.* at 673 (quoting *Arizona v. California*, 373 U.S. 546, 586-87 (1963)). Instead, the Court reaffirmed that in distributing project water and recognizing water rights, the Government is bound by state law, consistent with the principle of beneficial use, unless a specific provision of the Reclamation Act plainly provides otherwise. *Id.* at 668 n.21, 678-79 & n.31.

d. Despite more than 45 years of clear direction from this Court, the Government continued its attempts to claim authority to decide for itself how best to allocate project water. In *Nevada v. United States*, 463 U.S. 110 (1983), the Government sought an order reallocating water rights from project landowners to an Indian Tribe. The Government claimed the right to take water from project landowners and give it to the tribe because, it said, the water previously allocated to the reclamation project belonged "to a single party – the United States," which could do with the water what it pleased. *Id.* at 121. "We are bound to say," this Court remarked, "that the Government's position, if accepted, would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West." *Id.*

Again, Chief Justice Rehnquist exhaustively recounted the principles and history set out in prior decisions, including *Ickes v. Fox*, *Nebraska v. Wyoming*, and *California v. United States*. *See* 463 U.S. at 122-26. "In light of these cases," the Court concluded, "the Government is completely mistaken if it believes that the water rights confirmed to it [by a prior water rights adjudication] for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." *Id.* at 126. To the contrary, "[o]nce these lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within

the Project to which these water rights became appurtenant upon the application of Project water to the land." *Id.*

3. This case represents another attempt by the Government to avoid the beneficial use provision of the 1902 Act and claim for itself the authority to control the distribution of, and title to, project water. The Federal Circuit's acquiescence in that attempt cannot be squared with this Court's decisions, or the decisions of the Washington Supreme Court.

There is no dispute that for decades petitioners have appropriated and put to beneficial use waters from the Columbia Basin Project on their project lands. As a matter of state and federal law, that use entitles petitioners to a permanent water right. *See, e.g.*, *Lawrence*, 192 Wash. at 299-300; *Ickes*, 300 U.S. at 95. Of course, as users of project water, petitioners are subject to the same limitations and responsibilities as other water right holders in the project. They do not contest that they are subject to the acreage limitations of the Act (which the Government has been only too happy to enforce, Pet. App. 35a). Petitioners likewise acknowledge that they are obligated to pay a portion of the operation and maintenance costs of the system, as well as their share of the construction costs of the project works. And, in fact, the Government has, for decades, been charging petitioners both operation and maintenance fees and the same construction charges it would have imposed under a Section 9(d) contract. *See* Pet. App. 23a.

The Government nonetheless insists that petitioners have acquired no permanent water right and never will; that they have no right to be free of

construction charges once their fair share of the construction costs have been paid; and that because they can never complete repayment of construction costs, they will never free themselves from the acreage limitations of the Act. Petitioners' access to those rights as project landowners, the Government argues, is a matter of bureaucratic grace, which it may withhold from farmers by offering them only extendable Section 9(e) contracts with nominal terms of ten years or less.

That conclusion, accepted by the court of appeals, is at odds with nearly 75 years of teaching from this Court. And it is incompatible with the Washington Supreme Court's decision in *Lawrence v. Southard*, which rejected a similar attempt by the Government to relegate landowners to temporary water utility contracts despite their longstanding beneficial use of the project water. *See* 192 Wash. at 297-303.

To be sure, neither this Court's cases, nor the Washington Supreme Court's decision in *Lawrence*, directly addressed the Government's latest means of evading the Act's beneficial use rule. But in approving the Bureau's stratagem, the court below disregarded the basic principles underlying those decisions. And, as discussed next, neither the 1939 nor the 1956 amendments to the Reclamation Act provides a basis for the Federal Circuit's departure from those precedents.

B. Nothing In Section 9(e) Deprives Project Landowners Of Their Right To Acquire A Permanent Water Right To Project Waters Put To Beneficial Use.

1. In 1939, Congress amended the Reclamation Act in order to provide the Government greater flexibility to develop a "feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payments of construction charges." 43 U.S.C. § 485. To that end, Congress declared that "obligations to pay construction charges may be revised or undertaken pursuant to the provisions of this subchapter." *Id.*

Notably, Congress did not declare that repayment obligations could be avoided altogether, or that it intended to provide a mechanism for depriving farmers of the ability to obtain a permanent water right in project waters. Instead, Sections 9(d) and 9(e) were enacted to create two methods under which the Government could continue to provide water to famers in economic distress, while at the same time maintaining the long-standing reclamation law mandate that the Government's construction costs eventually be repaid. Section 9(d) more closely approximated the prior regime, requiring the Government to contract with an irrigation district, 43 U.S.C. § 485h(d), to repay construction costs over a period of up to forty years, *id.* § 485(d)(3). Section 9(e) allowed greater flexibility. It permitted contracts with individual landowners as well as irrigation districts. *See id.* § 485h(e). And it did not require that the construction costs be fully repaid within forty years. *Id.* The provision nonetheless required the Secretary to charge an amount "sufficient to cover

. . . an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation." *Id.* § 485(e).

The language of Section 9(e) can easily be read in concert with prior reclamation law. The statute eased previous restrictions that required the Government to recoup the entirety of construction costs within a set period, but it nonetheless required repayment of an "appropriate share" of construction charges during the life of a Section 9(e) contract. It said nothing to indicate that farmers obtaining water under Section 9(e) and putting it to beneficial use were deprived of their state law right, protected by the 1902 Act and subsequent Acts, to obtain a water right. Nor did it say anything to indicate that once landowners *did* repay construction costs (whether within the initial nominal term of the contract, or over the course of one or more extensions) they were somehow disentitled to the benefits afforded other landowners who had repaid construction costs.

2. The court of appeals' contrary conclusion that Section 9(e) provided the Government a means of retaining title to project water beneficially used by project landowners must overcome serious obstacles. "The presumption disfavoring implied repeals has been a part of this Court's jurisprudence at least since 1842." *United States v. Fausto*, 484 U.S. 439, 462 n.9 (1988). Moreover, in the 1939 Act itself, Congress expressly declared the "provisions of previous Acts of Congress not inconsistent with the provisions of this subchapter shall remain in full force and effect." 43 U.S.C. § 485j. And Congress has

since reaffirmed the primacy of state law, and the beneficial use principle, in establishing water rights to project water. *Id.* § 485h-4. Thus, the court of appeals' conclusion that the 1939 Amendment created an implicit exception to the 1902 Act's beneficial use standard for allocating water rights requires convincing proof.

The court purported to find such proof in three aspects of the statute's text, but the text does not support its conclusions.

First, the court relied on the opening sentence of Section 9(e), which states that the Government may enter into a Section 9(e) contract "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d)." But all that sentence shows is that the Government has a choice of repayment contract options – it may entered into a "repayment contract pursuant to the provisions of subsection (d)" or it may enter into a repayment contract pursuant to subsection (e). The Federal Circuit's interpretation – which effectively reads the phrase "pursuant to subsection (d)" out of the statute – is far too slender a reed upon which to find an implied repeal.

Second, the Federal Circuit found support in the statutory definition of "repayment contract." Pet. App. 27a-28a. The 1939 Act defined that term to encompass "any contract providing for payment of construction charges to the United States." 43 U.S.C. § 485a(e). "Construction charges," in turn, were defined as "the amounts of principal obligations, payable to the United States." *Id.* § 485a(d). The construction-related component of petitioners' Section 9(e) charges falls easily within those definitions. *Cf. Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275,

286 (1958) (describing Section 9(e) contracts as requiring "[r]epayment, without interest" of the costs of "water supply facilities"). Although Section 9(e) does not require that the entirety of the principal be paid within the initial contracting period, that simply demonstrates that Congress gave the Government flexibility in determining how much the principal must be repaid, and over what period. But the charges nonetheless continue to contain an obligation to pay some of the principal costs of construction. Indeed, as noted above, the Bureau of Reclamation has long set petitioners' construction charges using the same amortization formula it applies to Section 9(d) contracts in the Columbia Basin Project.

Third, the court of appeals found it significant that Section 9(d) refers to an irrigation district's "general repayment obligation," while Section 9(e) refers to construction-related payments as "fixed charges." Pet. App. 27a (quoting 43 U.S.C. § 485h(d)(3)). But the Act's definition of "repayment contract" turns on the *substance* of the landowners' repayment obligations, not the short-hand labels Congress used in various parts of the statute to refer to those obligations. *See id.* § 485a(e).

Beyond these three unconvincing references to the text of the 1939 Act, the court of appeals relied exclusively on the text and legislative history of the subsequent 1956 Act. The later act, the court of appeals concluded, showed that the 1956 Congress viewed Section 9(e) as establishing a form of utility contract under which landowners simply rent water owned by the federal government and never obtain title to it. Pet. App. 26a-27a, 29a-30a. This Court has "often observed, however, that 'the views of a

subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *South Dakota v. Yankton Sioux Indian Tribe*, 522 U.S. 329, 355 (1998) (citation omitted); *see also Rainwater v. United States*, 356 U.S. 590, 593 (1958) ("[S]uch interpretation has very little, if any, significance."). And when those views are expressed through post-enactment legislative history (*see* Pet. App. 26a-27a) they are entitled to almost no deference at all. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 530 n.27 (2007) ("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight") (quoting *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005)).

The court of appeals ignored not only these admonitions but also that 1956 Act's express instruction that nothing in its provisions "shall be construed as affecting . . . the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder" and that "beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 485h-4. In conflict with that command, the Federal Circuit construed the 1956 Act as ratifying an understanding of Section 9(e) under which federal agencies (rather than state law) determine who is entitled to water rights in project water, and bureaucratic discretion (rather than beneficial use) provides the limit of those water rights.

In any event, as discussed next, the Federal Circuit's construction of the 1956 Act is wrong in its entirety; the Act in fact compels the Government to

afford petitioners repayment and other statutory rights.

C. The 1956 Amendments Confirm Petitioners' Right To The Benefits Of Repayment.

After 1939, the Government at first construed Section 9(e) as providing it the power to treat project water as its own and to maintain title to that water by refusing to enter into anything but Section 9(e) contracts with many landowners. Pet. App. 13a. For example, the Government restricted the entirety of the Central Valley Project in California – the nation's largest reclamation project – to Section 9(e) contracts. *See Ivanhoe*, 357 U.S. at 280, 286. Congress responded in 1956 with legislation designed to "alleviate several major objections that have been directed against" the Government's use of Section 9(e) contracts, namely:

> (1) that no assurance can be given in the contract itself or in any other document binding upon the Government that the contract will be renewed upon its expiration; (2) that the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investment; and (3) that the water users are not assured of a 'permanent right' to the use of water under this type of contract.

H.R. Rep. No. 84-1754, at 2.

The amendments required the Government to commit, in the text of its long-term Section 9(e)

contracts, to afford landowners the basic entitlements of reclamation law, including the right to repay construction costs and obtain a permanent right to project water. *See* 43 U.S.C. § 485h-1.[4] The legislation thus directly repudiated the Government's attempts to use Section 9(e) contracts to retain title to project water and evade the beneficial use command of the original Reclamation Act.

The Federal Circuit nonetheless concluded that the 1956 amendment did not apply to petitioners because their contracts were, in its view, short-term rather than long-term contracts. Pet. App. 18a-25a. The court further viewed Congress's failure to address short-term Section 9(e) contracts in the 1956 amendments as confirming that holders of such contracts enjoy no right to repayment or any opportunity to obtain a permanent water right. Pet. App. 26a-27a, 30a-32a. Both conclusions are wrong.

1. Perpetually Extending Contracts With Nominal Ten-Year Terms Are "Long-Term Contracts" Within The Meaning Of The 1956 Amendment.

First, although the 1956 Amendments apply only to "long-term" Section 9(e) contracts, *see* 43 U.S.C. § 485h-1, petitioner's 35-year-old contracts fall within any reasonable understanding of that term. The statute defines "long-term contract" to "mean any contract the term of which is more than ten years." *Id.* § 485h-3. The court of appeals read the word

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[4] The full text of Section 485h-1 is reproduced *infra*, at 65a-67a.

"term" narrowly, to encompass only the nominal initial period of a contract. While that may be one possible interpretation of the word read in isolation, it is not the only available construction. The "term" of a contract can also be understood as the contemplated duration of the contract, or the time during which the contract has been in effect. For example, a contract that automatically extends each year for eleven years could easily be referred to as a contract with an eleven-year term. There would be no practical distinction between such a contract and one with an initial nominal eleven-year term.

Nor is there any practical difference between petitioners' perpetually extending contracts – which have been extended beyond ten years without action by the parties[5] – and a contract with a nominal term of 30 or more years, subject to termination for good cause. By their plain text, the contracts contemplate operation beyond ten years, providing for automatic extension "without further notice" so long as petitioners continue to hold state water permits. Pet. App. 18a.[6]

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[5] The contracts were materially modified only once to apply the provisions of the Reclamation Reform Act of 1982 and its implementing regulations to the contracts. Pet. App. 34a.

[6] The fact that the extension is contingent on petitioners' maintaining their state permits does not render the contracts "short-term." No one would suggest that a contract with a nominal term of more than ten years is converted into a short-term contract by inclusion of a provision allowing the Government to cancel the contract at any time if the landowner fails to renew a state permit.

More importantly, there is no reason to think that Congress would have intended to distinguish between petitioners' contracts and those with nominal eleven-year terms. The 1956 Act was an intensely practical response to the real world problems of western farmers, who complained that the Government was using its Section 9(e) authority to deprive them of basic reclamation law rights. *See, e.g.*, H.R. Rep. No. 84-1754, at 2. It defies belief to think that Congress wrote the statute in a way that would allow the Government to continue its prior practices by simply limiting landowners to perpetually extending contracts with nominal ten-year terms. The statute was enacted precisely to ensure that farmers who have made substantial, long-term investments in their land that depend on a stable long-term supply of project water will be guaranteed a chance to obtain a permanent water right and the other benefits of repayment. A statute that afforded the Government the power it claims here would have achieved none of the Act's basic objectives.

2. Even If Petitioners' Contracts Are Deemed "Short-Term," The 1956 Act Did Not Exempt Petitioners From The Basic Entitlements Of Reclamation Law.

Even if petitioners' contract were deemed "short-term" within the meaning of the 1956 amendments, that would not disentitle them to the rights afforded under the 1902 Act to all landowners who put project water to beneficial use.

1. The Federal Circuit construed the 1956 Act's explicit confirmation of repayment rights for long-

term Section 9(e) contracts to imply that Congress intended to withhold those rights from holders of short-term Section 9(e) contracts. But as shown above, prior to 1956 *all* landowners obtained a water right to project waters put to beneficial use, had the responsibility to pay construction costs, and enjoyed important benefits when those construction costs had been repaid. The 1956 Amendments, which said *nothing* about the rights of short-term contract holders, did not purport to alter existing law in this regard. Even if one thought that the 1956 Congress was acting on the (incorrect) assumption that its predecessors had not extended repayment rights to short-term contracts, that unexpressed assumption is an insufficient basis to find an implied repeal of short-term contract holders' pre-existing rights. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (citations omitted). And in any event, as noted above, Congress expressly reaffirmed in the 1956 amendments that water rights continued to be allocated by state law, not by the federal government, and that beneficial use remained the "basis, the measure, and the limit of the right." 43 U.S.C. § 485h-4. Those principles entitle petitioners to obtain a permanent water right, and the concomitant right to repayment, however their contracts with the Government may be described.

2. In any event, the Reclamation Reform Act of 1982 (RRA), Pub. L. No. 97-293, tit. II, 96 Stat. 1261 (codified at 43 U.S.C. §§ 390aa-390zz), removed any

lingering ambiguity through provisions that plainly contemplate that Section 9(e) contracts are a form of repayment contract.

The RRA defines the term "contract" to mean "any repayment or water service contract between the United States and a district providing for the payment of construction charges to the United States." 43 U.S.C. § 390bb(1). By referring to both "repayment" *and* "water service" contracts as being capable of "providing for the repayment of construction charges," Congress precluded any argument that Section 9(e) created a new kind of contract that can never repay construction charges.[7]

The Federal Circuit's decision is also incompatible with the basic purposes of the RRA. The RRA revised the Act's acreage limitations and required higher prices for water provided temporarily to lands held in excess of those limits. *See* 43 U.S.C. §§ 390dd, 390ee. At the same time, however, it ensured that once construction costs were repaid, both the acreage limitation and higher pricing provisions no longer applied. *Id.* §§ 390mm, 390tt. The court of appeals declined to decide whether petitioners' contracts were subject to the RRA restrictions (even though the Government has been enforcing those restrictions against petitioners for decades). *See* Pet. App. 35a. But its decision in this case must lead to either of two untenable results.

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[7] There is no dispute that petitioners' contracts are subject to the RRA. Indeed, the Government insisted that petitioners' contracts be amended to conform to the RRA and its implementing regulations. *See* Pet. App. 29a.

First, if petitioners *are* subject to the RRA restrictions, the court of appeals made clear that they are unable to ever escape them because they can never repay construction costs. Second, the only way to avoid that absurd result, consistent with the decision below, would be to hold Section 9(e) contracts like petitioners' are *not* subject to the RRA's acreage and pricing limitations. But that would contravene the RRA's plain intent and language. *See* 43 U.S.C. § 390dd (providing in unambiguous terms that "irrigation water *may not be delivered* to" lands in excess of the acreage limitations) (emphasis added). The only exception the statute allows is for delivery of temporary excess supplies of water (and only for one year). *See* 43 U.S.C. § 390oo(a).

The Federal Circuit's refusal to decide between these untenable alternatives, *see* Pet. App. 35a-37a, only highlights the incompatibility of its holding with the RRA.

II. The Federal Circuit's Decision Will Have A Profound Effect On Irrigators Throughout The Western United States.

Certiorari is also warranted in light of the surpassing importance of the question presented to landowners throughout the West.

1. The Government's disregard for Congress's restriction on its authority has profound consequences not only for the petitioners in this case, but also for thousands of other farmers. The Government has made extensive use of Section 9(e) contracts, including in some of the most massive and significant projects in the country, such as the California Central Valley Project and the Klamath

Project in Oregon and California. *See* U.S. Bureau of Reclamation, RATESETTING PROCESS, *available at* www.usbr.gov/mp/cvpwaterrates/rate_process/overview.html (noting that Government has used 9(e) contracts for 221 districts involving thousands of farms within the Central Valley Project, and thousands more in 22 other reclamation projects). Section 9(e) contracts thus govern water distribution to millions of acres of reclamation project land. In fact, in 2005, the Government administered more than twice as many Section 9(e) contracts as Section 9(d) contracts. *See* Duane Meacham & Benjamin M. Simon, *Forging a New Federal Reclamation Water Pricing Policy: Legal and Policy Considerations*, 27 ARIZ. ST. L.J. 507, 533 (2005) ("The Bureau of Reclamation currently is a party to 1,980 water service contracts and 865 repayment contracts.").

At the same time, the practical importance of a permanent right to project water is difficult to overstate. "Certainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620 (1983). Petitioners and other landowners like them have invested substantially in farms that are viable only if provided with adequate water from the project. Diminishment of their entitlement, even for a single year, can have catastrophic consequences. For example, some project landowners draw water to irrigate orchards that have taken years of tending without producing any revenue before reaching a productive age. A single year of inadequate irrigation can destroy an orchard, and with it, a family's business and lifetime savings.

Even when adequate water is provided, unless this Court intervenes, farmers irrigating under perpetually extending Section 9(e) contracts will never be able to repay their share of construction costs and become free of construction indebtedness. At the same time, because they are precluded from repaying construction costs, they will never escape acreage limitations that prevent them from taking advantage of the economies of scale enjoyed by other western landowners given more favorable treatment by the Government. The demise of the small family farms envisioned by the first Reclamation Act is a testament to the economic reality that larger farms using expensive modern equipment can raise crops more efficiently. Under the decision below, petitioners and others like them are condemned to a permanent competitive disadvantage against other farmers (even farmers within the same reclamation project) who are able to pay off construction costs and expand their land holdings and productivity.

The decision below will have broader consequences as well, affecting holders of both short- and long-term Section 9(e) contracts, as well as the greater public. Although Congress and this Court have repeatedly made clear that water rights arise as a matter of statute from the beneficial application of project water to project land – *see, e.g.*, 43 U.S.C. §§ 372, 383, 485h-4; *California v. United States*, 438 U.S. at 667; *Ickes*, 300 U.S. at 94-95 – the court of appeals construed the 1939 and 1956 amendments to afford holders of Section 9(e) contracts (short- and long-term alike) only a contractual right to receive water to which the United States retains ownership. *See, e.g.*, Pet. App. 13a-18a. One consequence of that

interpretation is that Section 9(e) contract holders throughout the West will be confronted with the prospect of increased costs of financing their farms due to uncertainties as to their rights to continue to use project water.

Whether title to water is held by the Government or by farmers can have other consequences as well. For example, who owns project water rights could affect whether (or how) the Endangered Species Act and the National Environmental Policy Act apply to the administration of reclamation projects. *See, e.g.*, *Nat'l Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) (considering those Acts' application to reclamation project water distribution and noting that "[w]here there is no agency discretion to act, the [Endangered Species Act] does not apply"). And the status of farmers' water rights may also affect whether the Government must pay just compensation when it reduces water deliveries to meet other priorities. *See, e.g.*, Douglas L. Grant, *ESA Reductions In Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331 (2006).

2. Review in this case would also permit this Court to resolve confusion that has arisen regarding the degree to which the Government's contracting authority can affect the nature and scope of water rights obtained through beneficial use. *See, e.g.*, Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation Project Water*, 16 VA. ENVTL. L.J. 363, 391-93 (1997) (describing conflicting views among courts).

While no other court has addressed the precise question presented here, that is no reason to delay

review. By their nature, reclamation law questions do not regularly generate broad circuit conflicts, as the vast majority of reclamation projects are concentrated in a handful of states. *Cf.*, *e.g.*, Meacham, *supra*, at 533 (noting that "[a]bout 70% of all water service [contracts] . . . are in the Pacific Northwest region"). Moreover, by virtue of its jurisdiction over appeals in cases seeking damages for Reclamation Act violations, *see* Pet. App. 5a-9a; *United States v. Hohri*, 482 U.S. 64 (1987), the Federal Circuit plays an outsized role in Reclamation Act law.

In this case, the parties exhaustively briefed, and the court of appeals thoroughly considered, the question presented by the petition. Further delay is unlikely to provide any additional useful ventilation, while tremendous and irreparable damage can be done to thousands of farms in the West in a short period of time if the issues presented in this case are left for another day. Nor is there any reasonable prospect that the Government will alter course without this Court's intervention.

Accordingly, the Court should, as it has often done in the past, grant certiorari to remind the Government of its limited authority under reclamation law and restore to western farmers the important rights Congress intended to provide them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 16, 2010

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2008-1354

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT (GCBSID) and WILLIAMSON LAND COMPANY,

Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF RECLAMATION, KEN SALAZAR, Secretary of the Interior, ROBERT W. JOHNSON, in his capacity as Commissioner of the Bureau of Reclamation, J. WILLIAM MCDONALD, in his individual capacity, and J. WILLIAM MCDONALD, in his capacity as Regional Director of the Pacific Northwest Region of the Bureau of Reclamation,

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Washington in case no. 06-CV-204, Chief Judge Robert H. Whaley.

DECIDED: September 2, 2009

Before SCHALL, BRYSON, and LINN, Circuit Judges.

BRYSON, Circuit Judge.

I

In 1937, Congress authorized a multipurpose reclamation project known as the Columbia Basin project, which was designed to irrigate farmland in central Washington with water drawn from the Columbia River. Over time, water that seeped into the ground from the surface irrigation created significant quantities of artificially stored groundwater in the Quincy Basin area. The Washington Department of Ecology began managing the Quincy Basin groundwater in 1973 but later accepted the federal government's claim to ownership of that water. *See Flint v. United States*, 906 F.2d 471, 473-74 (9th Cir. 1990); *Jensen v. Wash. Dep't of Ecology*, 102 Wash.2d 109, 685 P.2d 1068, 1070 (1984). The Bureau of Reclamation, an agency within the United States Department of the Interior, subsequently issued a standard form contract authorizing private landowners to use the Quincy groundwater. The contracts were executed under the authority of section 9(e) of the Reclamation Project Act of 1939 ("the 1939 Act"), Pub. L. No. 76-260, 53 Stat. 1187, codified at 43 U.S.C. § 485h(e). Since 1975, the withdrawal of Quincy groundwater by private landowners has been conditioned on the execution of the Bureau's section 9(e) contract and on

the receipt of a state permit from the Washington Department of Ecology.

There are currently 292 landowners in the Quincy Basin that have entered into a water supply agreement with the Bureau of Reclamation. They include the Williamson Land Company ("Williamson") and the members of the Grant County Black Sands Irrigation District ("GCBSID"). In consideration for a "license to withdraw and use its artificially stored ground water," the Bureau charges the landowners an annual "[p]ayment for water" consisting of a variable charge for operation and maintenance, and a fixed charge of $1.70 per acre "for participation in Project construction repayment." The Bureau's standard form contract also states that the license "shall continue for a period of 10 years" and "shall be extended ... for an additional like period without further notice provided the State permit ... has been extended for a similar period."

Initially, the Washington state permits issued to the Quincy groundwater users had 10-year terms. In 1983, the Washington Department of Ecology eliminated the 10-year term limitation. The state permits are now automatically renewed subject only to the Department's authority to modify or terminate the permits "at any time for good cause." Wash. Admin. Code 173-134A-080(2)(i) (2009); *see also* Wash. Rev. Code. § 90.40.100 (2009). While the landowners' contracts with the Bureau have been renewed several times, the material terms and provisions of the current contracts are identical in all respects to the standard form water service contract promulgated by the Bureau in 1975.

In July 2006, the appellants brought this suit as a class action in the United States District Court for the Eastern District of Washington. The action was brought on behalf of all landowners located within the GCBSID that hold water service contracts for the withdrawal of Quincy groundwater. The complaint sought injunctive and monetary relief against the Bureau of Reclamation. The appellants' theory of the case was that they were entitled to the statutory benefits accorded to holders of "repayment contracts" and "long-term water service contracts" under reclamation law. The appellants filed two motions for partial summary judgment, and the government filed a motion to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, to render judgment on the pleadings.

The district court rejected the appellants' statutory theory and dismissed the complaint. The court canvassed the statutory provisions cited in the parties' briefs and concluded that the contracts at issue are "short-term water service contracts," not "repayment contracts" or "long-term water service contracts," and that the appellants are not entitled to the same statutory benefits accorded to holders of the latter two types of contracts. The court denied the appellants' motions for summary judgment as moot. *Grant County Black Sands Irrigation Dist. v. United States*, 539 F. Supp. 2d 1292, 1298-99 (E.D. Wash. 2008).[1] The appellants then took this appeal.

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[1] Although the district court's analysis is largely directed at demonstrating why the appellants' claims fail on the merits, the

II

At the outset, the parties disagree about whether this court has jurisdiction over the appeal. The appellants argue that their claim for $10,000 in damages constituted a claim under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2). Because the jurisdiction of the district court was based in part on that Act, the appellants submit that this court has appellate jurisdiction under 28 U.S.C. § 1295(a)(2). The government responds that in substance this is an

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court at one point stated that because the plaintiffs had "failed to establish a claim under the APA, they are not entitled to an APA waiver of sovereign immunity." Based on that language in the district court's order, the government argues that the court dismissed the complaint for want of jurisdiction. In fact, the court's order is more properly characterized as a dismissal on the merits. The complaint set forth statute-based claims that, if accepted, would have justified relief either in the form of damages or an order affecting the parties' rights under their contracts, or both. That was sufficient to confer jurisdiction on the district court. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 21 n.6, 102 S.Ct. 2202, 72 L. Ed. 2d 639 (1982); *Bell v. Hood*, 327 U.S. 678, 680-81, 66 S.Ct. 773, 90 L.Ed. 939 (1946). The government's argument that the district court had no jurisdiction under the APA focuses on the merits of the appellants' statutory claims and is predicated on the erroneous notion that a court does not have jurisdiction to address a claim that is incorrect on the merits. Accordingly, to the extent that it may be pertinent in any future proceedings, we treat the dismissal as having been on the merits rather than on jurisdictional grounds. *See Lewis v. United States*, 70 F.3d 597, 604 (Fed. Cir. 1995).

appeal from the denial of a request for equitable relief and that the jurisdiction of the district court was invoked under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., not the Little Tucker Act. For that reason, the government contends, appellate jurisdiction lies in the Ninth Circuit, not in this court.

It is certainly true that much of the relief sought by the appellants was equitable in nature. However, this court has jurisdiction over an appeal as long as the jurisdiction of the district court was based "in whole or in part" on the Little Tucker Act. *Wopsock v. Natchees*, 454 F.3d 1327, 1331 (Fed. Cir. 2006). The question for us is not whether the main thrust of the action in the district court was equitable, but whether the district court's jurisdiction was based, even in part, on section 1346(a)(2). The complaint listed the Little Tucker Act as one of the bases for the district court's jurisdiction and sought "specific monetary relief for illegal overcharges imposed on them by the Bureau of Reclamation." We therefore focus on the appellants' allegations with respect to the water use charges assessed by the Bureau of Reclamation.

The appellants' theory of the case proceeded from the premise that the contracts of the landowners they represent are not contracts to purchase water, but contracts to repay the federal government for their share of the construction costs of the irrigation projects. Both in the complaint and in various pleadings before the district court, the appellants cited a number of statutory provisions and court decisions as support for the proposition that any

administrative overcharges assessed by the Bureau of Reclamation must be credited toward that repayment obligation or be refunded to the landowners. The complaint alleged that the Bureau of Reclamation had overcharged the landowners for the operation and maintenance of the irrigation works and that if those excess charges had been properly credited to repayment, the landowners' contractual payment obligations would have ended several years ago. The "monetary relief" sought by the appellants was a refund of the alleged overcharges for operation and maintenance, or alternatively a credit in the amount of the alleged excess charges toward the landowners' repayment obligation. In that regard, the prayer for relief included a request for judgment that the landowners are entitled to "receive an aggregate total sum of $10,000 in damages against the United States for the ... advance collection of administrative charges for administration of the Quincy Ground Water Subarea Artificially Stored Ground Water Program from the Plaintiff class."[2]

That theory of relief in effect seeks damages for an unlawful exaction. *See United States v. Testan*, 424 U.S. 392, 401-02, 96 S.Ct. 948, 47 L. Ed. 2d 114

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[2] One of the statutory benefits claimed by the appellants was the right to operate and manage the irrigation works through a water users' association or an irrigation district, such as the GCBSID. *See, e.g.*, 43 U.S.C. §§ 498-501. Thus, the complaint further specified that the $10,000 award shall be "in the form of payment to GCBSID ... in the year in which the GCBSID takes over the administration and management of the program."

(1976); *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005); *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1348 (Fed. Cir. 2005); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1582-73 (Fed. Cir. 1996). Under that theory, the trial court had Little Tucker Act jurisdiction because if the appellants' theory of the case were accepted on the merits, the relief to which the landowners would be entitled would include up to $10,000 in damages by way of a refund of previous administrative overcharges. *See, e.g., Brazos Elec. Power Co-op., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998) ("Whether this refund is paid directly ... or whether it is credited towards other money ... owe[d] to the federal government is irrelevant to our analysis.").

Notwithstanding the reference to the Little Tucker Act in the complaint, the government argues that the appellants waived that claim. It is true, as the government contends, that the appellants' response to the government's motion to dismiss in the district court contained no express reference to the Little Tucker Act. But because the district court's jurisdiction could readily be sustained on other grounds, such as the APA, it is not surprising that the appellants focused their attention on those other grounds for opposing the motion to dismiss. In an effort to preserve their APA claim before the district court, the appellants argued that the limitations on equitable remedies under the Tucker Act precluded complete and adequate relief in the Court of Federal Claims. *See, e.g., Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 200-02 (Fed. Cir. 1997). By emphasizing the equitable relief sought in the

complaint, however, the appellants did not waive their claim to a refund under the Little Tucker Act. They made clear that even if the district court were to dismiss the APA claim, the action would survive "at least as to that part of the Plaintiffs' claims which seeks refund of overcollections assessed against them by BOR." Moreover, the appellants' filings in the district court further demonstrate that they did not abandon their Little Tucker Act claim; in a pleading filed pursuant to the district court's scheduling order, the appellants asserted that they "have made a Little Tucker Act Claim," citing the paragraph in the complaint seeking $10,000 in damages for administrative overcharges that they claim the landowners should not have had to pay. Because the jurisdiction of the district court was based at least in part on the Little Tucker Act and because the appellants did not waive their Little Tucker Act claim in the district court, we have jurisdiction over this appeal.

III

On the merits, the central issue in this appeal is whether the Secretary of the Interior committed legal error in denying the appellants the statutory benefits that are accorded to holders of "repayment contracts" and "long-term" water service contracts. The appellants present three grounds for compelling the Secretary to grant them those benefits: (1) their contracts are "long-term" water service contracts, within the meaning of section 9(e) of the 1939 Act, and they are entitled to the statutory benefits

accorded to holders of such contracts; (2) their contracts are "repayment contracts," as defined in section 2(e) of the 1939 Act, 43 U.S.C. § 485a(e), and they are entitled to the statutory benefits accorded to holders of such contracts; and (3) the Secretary, acting through the Bureau of Reclamation, has already granted the appellants the benefits due to holders of repayment and long-term water service contracts, and cannot now revoke those benefits. Before we address the merits of those arguments, we briefly review the general principles of reclamation law and the different types of contracts for the delivery of project water.

Modern reclamation law has its roots in the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, as amended, 43 U.S.C. §§ 371 et seq., which laid the groundwork for a vast and ambitious federal program to irrigate the arid lands of the western states. Under the 1902 Act, the Secretary of the Interior was charged with building dams, canals, and other irrigation facilities to be financed through the sale of federally owned lands. 43 U.S.C. §§ 391, 411. It was expected that the owners of the newly irrigated lands would repay their share of the construction costs of the reclamation projects over a 10-year period. Reclamation Act of 1902, § 4, 32 Stat. 388, 389 (current version at 43 U.S.C. §§ 419, 461). The operation and maintenance costs of the projects, however, were to be the responsibility of the federal government until such time as the construction payments had been made for the major portion of the lands irrigated by the projects, at which point the

management and operation of the projects would pass to the landowners. 43 U.S.C. § 498.

It soon became clear that the landowners' repayment obligations far exceeded their ability to pay. Congress therefore extended the repayment period to 20 years in 1914 and to 40 years in 1926. 43 U.S.C. §§ 423e, 475; see S.T. Harding, *Background of California Water & Power Problems*, 38 Cal. L. Rev. 547, 557 (1950). In light of the repayment extensions, Congress required the landowners to reimburse the federal government for their share of the annual operation and maintenance costs of the projects. 43 U.S.C. §§ 492, 493. The Secretary of the Interior, however, was granted discretionary authority to transfer the operation and maintenance of all or any part of the irrigation project works to a water users' association or an irrigation district. *Id.* § 499.

In the wake of the Great Depression, as landowners became increasingly unable to meet their repayment obligations, Congress enacted the Reclamation Project Act of 1939. The goal of the 1939 legislation was to restructure the landowners' repayment obligations on the basis of ability to pay, while still protecting the federal government's financial investment in the reclamation projects. *See* 43 U.S.C. § 485. To that end, the 1939 Act addressed the Secretary's contracting authority in two respects that are of particular relevance to this appeal.

First, in section 9(d) of the 1939 Act Congress authorized the Secretary of the Interior to enter into the classic repayment-type contract contemplated by the 1902 Act. Such contracts, typically called "9(d)

contracts," were made available only to irrigation districts, water users' associations, and other organizations "satisfactory in form and powers to the Secretary." 43 U.S.C. § 485h(d). Under a 9(d) contract, the organization would receive project water in exchange for assuming a "general repayment obligation," which had to be repaid "over a period of not more than 40 years." *Id.* § 485h(d)(3). The repayment obligation was defined in the 1939 Act as that "part of the construction costs allocated by the Secretary" to the organization. *Id.* § 485h(d)(2). Thus, the 9(d) contract was in form and substance a straightforward application of the repayment principle that governed reclamation law prior to the 1939 Act.

Second, in section 9(e) of the 1939 Act Congress created a new source of contracting authority for the Secretary, known as a "9(e) contract." Section 9(e) provided that, "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d)," the Secretary had discretion to enter into "either short- or long-term contracts to furnish water for irrigation purposes." The water supplied under 9(e) contracts was supposed to be provided "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." Although 9(e) contracts were described as either "short-term" or "long-term," the 1939 Act did not define those terms or indicate that any legal consequences would turn on the "short-term/long-term" distinction. 43 U.S.C. § 485h(e).

The principal difference between 9(d) and 9(e) contracts under the 1939 Act was that under a 9(d) contract, the irrigation district or water users' association assumed an obligation to repay the construction costs of the project works in fixed annual installments over a predetermined period of time. By contrast, a 9(e) contract was merely a contract to receive project water at an annual rate set by the Secretary. The 9(e) contract was also more limited in its application than a 9(d) contract, because the Secretary was statutorily prohibited from using a 9(e) contract to charge landowners for the fixed costs of "irrigation water distribution works," such as canals and laterals. *See* Alfred R. Golze, *Reclamation in the United States* 107 (1961) (section 9(e) applies to "water supply works," such as dams and reservoirs); Arthur A. Maass, *Administering the CVP*, 38 Cal. L. Rev. 666, 672 (1950); Bureau of Reclamation, Dep't of the Interior, *Repayment of Reclamation Projects* xiii, xli, xlii (1972); *see also Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 286-87, 78 S.Ct. 1174, 2 L. Ed. 2d 1313 (1958).

The legislative history of the 1939 Act does not provide a clear account of Congress's reasons for authorizing the Secretary of the Interior to enter into 9(e) contracts. Although the committee reports on the 1939 Act indicate that Congress was generally focused on "introducing flexibility into the contracts under which water users repay to the Government the cost of construction of Federal reclamation projects," there is little by way of explanation for why Congress thought section 9(e) was necessary to accomplish that goal. H.R. Rep. No. 76-995, at 1

(1939); S. Rep. No. 76-758, at 1 (1939). The 1939 Act was based in part on the findings of a special commission charged with studying the factors and conditions affecting the repayment of construction charges. *See* H.R. Rep. No. 76-995, at 2 (1939). One of the commission's recommendations was that "water should be delivered on a rental basis" to certain specified projects for which the landowners were unable to pay even the operation and maintenance costs. H.R. Doc. No. 75-673, at 20, 38 (1938). It may be that Congress decided to adopt the commission's recommendation for a broad class of reclamation projects, such as dams, reservoirs, and other large-scale works for which the landowners could not be expected to repay the construction costs.

In part, section 9(e) codified the Bureau of Reclamation's pre-existing practice of taking a "water rental" approach when the total costs of the project could not be determined until after the project had been completed. *See* Harry P. Glassman, The *Validity of the 9(e) Contract*, 38 Cal. L. Rev. 739, 741 n.9 (1950); *see also* H.R. Doc. No. 75-673, at 11 (1938). Several commentators suggested, however, that the introduction of 9(e) contracts constituted a departure from the repayment model insofar as the new contracts permitted the federal government to take on the role of a public utility, rather than a contractor of last resort for reclamation projects. *See* Harding, *supra*, at 569 ("Under the 9e contract the Bureau of Reclamation becomes a public utility selling service instead of a construction agency selling constructed projects to their users."); Roy E. Huffman, *Irrigation Development & Public Water Policy* 93 (1953) ("This

type of contract places the Bureau of Reclamation very much in the category of a public utility."); Maass, *supra*, at 671 (holders of 9(e) contracts essentially "purchase a utility service in the same sense that a citizen anywhere purchases electric power at an agreed rate"); *see also* S.V. Ciriacy-Wantrup, *Natural Resource Economics* 189-192 (1985); Glassman, *supra*, at 739-45; Water Res. Policy Comm'n, *Ten Rivers in America's Future* 248-49 (1950).

Whatever the reasons for Congress's decision to authorize 9(e) contracts, the Bureau of Reclamation soon began entering into 9(e) contracts in connection with a number of existing and newly constructed reclamation projects. Irrigation districts and landowners, particularly in the San Joaquin Valley of California, vigorously contested the use of such utility-type contracts, arguing that the Bureau of Reclamation was not authorized to enter into water rental contracts. *See* Sheridan Downey, *They Would Rule the Valley* 243 (1947). The Bureau of Reclamation also encountered considerable resistance to its standard form water rental contracts, which did not guarantee any permanent water rights or grant any credit toward repayment of the construction costs of the project. *See* Ciriacy-Wantrup, *supra*, at 189-192; Downey, *supra,* at 226-29, 243-46; Huffman, *supra,* at 93; Raymond Moley, *What Price Federal Reclamation?* 20-22 (1955); Robert de Roos, *The Thirsty Land* 154-58 (1948).

In 1956, Congress took up the landowners' cause and supplemented sections 9(d) and 9(e) of the 1939 Act. *See* Pub. L. No. 84-643, 70 Stat. 483 (1956)

(codified at 43 U.S.C. §§ 485h-1 to 485h-6). It did so principally by conferring new benefits on holders of "long-term" 9(e) contracts, which were defined as 9(e) contracts having a term of more than 10 years. 43 U.S.C. § 485h-3. Those benefits included (1) the right to renew the contract on "terms and conditions mutually agreeable to the parties," (2) the right to convert the contract into "a contract under [section 9(d)]," and (3) the right to cease paying the "construction component" of the total use charge when the payments in excess of the government's operation and maintenance charges equaled the construction cost of the project. *Id.* § 485h-1. Thus, although the "short-term/long-term" distinction predated the 1956 legislation, Congress for the first time added meaning to that distinction. Significantly, the 1956 Act contained no reference to extending benefits to short-term 9(e) contracts similar to those that were extended to long-term 9(e) contracts.

As the committee reports on the 1956 Act make clear, the purpose of the legislation was to address the landowners' concerns

> (1) that no assurance can be given in the contract itself or in any other document binding upon the Government that the contract will be renewed upon its expiration; (2) that the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investment; and (3) that the water users are not assured of a "permanent right"

> to the use of water under this type of contract.

S. Rep. No. 84-2241, at 2 (1956); H.R. Rep. No. 84-1754, at 2 (1956); *see also Ivanhoe*, 357 U.S. at 297-98, 78 S.Ct. 1174 (the 1956 Act "answered most of the objections lodged against" the requirements of section 9(e) of the 1939 Act). It was equally clear, however, that Congress did not intend for the 1956 legislation to repudiate the Bureau of Reclamation's general view that the "so-called water service or utility type contracts as authorized by the Reclamation Project Act of 1939 represented an innovation in reclamation law." S. Rep. No. 84-2241, at 2 (1956). The 1956 Act merely made it "possible for the Secretary of the Interior in approving so-called 'water service' and 'utility type' contracts to meet objections" of the landowners with respect to renewability, crediting, and permanent water rights. *Id.* Thus, 9(e) contracts continued to be treated as "water service" or "utility-type" contracts, distinct from 9(d) contracts and the repayment-type contracts envisioned by the 1902 Act. *See* 4 Robert E. Beck, *Water & Water Rights* 39-58 n.245, 39-59 n.247 (1991) ("Contracts under § 9e are not really repayment contracts, but rather water supply contracts that may take into consideration project costs, but do not purport to collect full payment in any set period of time"); Frank J. Trelease & George A. Gould, *Cases & Materials on Water Law* 697 (4th ed. 1986) (section 9(e) contracts have been "likened to the arrangement made by a public utility furnishing water to consumers"); *see also* Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation*

Project Water, 16 Va. Envtl. L. J. 363, 371 (1997) ("The repayment contract is analogous to a mortgage, while a water service contract is more like a lease."); Golze, *supra*, at 247, 256. With that historical and statutory context in mind, we turn to the appellants' challenges to the government's position with respect to their contract rights.

IV

We begin by addressing the narrowest of the appellants' grounds for relief, namely that the contracts at issue are long-term contracts under section 9(e) of the 1939 Act, 43 U.S.C. § 485h(e). The appellants assert that if we were to accept their characterization of the contracts as long-term contracts, they would be entitled to the renewal, conversion, and repayment credit rights set forth in the 1956 Act and codified at 43 U.S.C. § 485h-1.

As noted, a long-term contract is defined as any contract to furnish water "the term of which is more than ten years." 43 U.S.C. § 485h-3. Article 6 of the landowners' contracts states, in pertinent part:

> *TERM.* This license shall be effective on the date hereof and ... shall continue for a period of 10 years, or until the termination date of the Landowner's State permit if it is earlier, and shall be extended ... for an additional like period without further notice provided the State permit referred to in Article 3 has been extended for a similar period with a new termination date therefor....

During the initial 10-year term of their contracts, the landowners were required to pay only a percentage of the annual water user charge calculated by the Bureau of Reclamation. With respect to the amounts due after the initial 10-year term, the contracts state that "[r]enewals will be billed at 100 percent." Because the contracts "continue for a period of 10 years," albeit with the possibility of renewal, they are not, on their face, "long-term" contracts as that term is defined in section 485h-3.

A

The appellants make two arguments as to why their contracts are "contracts for more than ten years" despite the explicit 10-year term set forth in Article 6. First, they argue that the contracts are permanent and uninterruptible because the underlying state permits do not expire after a term of years. While the appellants acknowledge that the state permits may be terminated for good cause by the Washington Department of Ecology, they contend that Congress has preempted the field of reclamation law and that the state of Washington is therefore required to exercise its authority to terminate the permits in conformity with federal law. Under the appellants' theory, the good cause requirement for terminating the appellants' state permits is essentially a nullity-the circumstances justifying the termination of the permits are the same as those that would trigger a termination of the contract itself. Since the appellants contend that renewal is automatic, they regard the contracts as having a

perpetual term that is necessarily greater than 10 years.

We need not decide the precise contours of the good cause requirement under Washington law, because the appellants' argument is based on the flawed assumption that the "term" of the contracts necessarily includes any periods of renewal following the expiration of the contracts' designated duration of a "period of 10 years." That argument is contrary to the most natural meaning of the word "term," as it is used in the contracts, and it is also contrary to the parties' expressed intentions as to the matter and to the statutory and regulatory backdrop of the contractual arrangements at issue in this case.

The essence of the appellants' argument is that the "term" of the contract should be interpreted to include the renewal periods, in which case the contract "term" would be indefinite or perpetual. That interpretation is contrary to the ordinary meaning of the word "term," which is "a period of time with some definite termination." *Black's Law Dictionary* 1470 (6th ed. 1990). Moreover, interpreting the word "term" in the contract to include the renewal periods would render meaningless the "shall continue for a period of 10 years" clause in the contracts. If the parties intended to create a contractual relationship of indefinite duration, they could simply have provided that the contracts would remain in effect until either the landowners or the Bureau of Reclamation exercised their termination rights under Article 12. In order to give full effect to the parties' expressed intentions on

the matter, the contracts must be understood as limited to 10-year "terms."

The relevant provisions of the 1956 Act support the conclusion that the "term" of a 9(e) contract does not refer to the combination of the stated term and any potential renewal periods. One of the objections to the utility-type contracts under section 9(e) was that the landowner could not be assured of a stable water supply because there was no guarantee that the Bureau of Reclamation would renew the contract upon expiration. *See* S. Rep. No. 84-2241, at 2, 5 (1956); H.R. Rep. No. 84-1754, at 2, 4 (1956). Responding to that concern, Congress provided in the 1956 Act that the Secretary of the Interior shall, upon request of the private contractor, include in any long-term 9(e) contract a provision for renewal of the contract "under stated terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(1). Congress also provided for long-term contract holders to receive certain water rights "during the term of the contract and of any renewal thereof." *Id.* § 485h-1(4). In distinguishing between the "term of the contract" and any subsequent periods of "renewal," that language reflects that Congress did not regard renewal periods as being included within the contract's "term" as that word was used in the statute.

Elsewhere in the 1956 Act, the word "term" is similarly used to refer to the duration of a repayment contract under section 9(d) of the 1939 Act. *See* 43 U.S.C. § 485h-1(2) ("within the term of a contract under subsection (d) of section 485h of this title"). Because the Bureau of Reclamation is generally

prohibited from entering into 9(d) contracts that do not have fixed terms, *see id.* § 485h(d)(3), the use of the word "term" in connection with 9(d) contracts is consistent with the understanding that "term" refers to a fixed and designated period of time, not an open-ended, indefinite period. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 129, 103 S.Ct. 2266, 76 L. Ed. 2d 456 (1983) (the same terms in the same statute should be interpreted in conjunction with each other).

The appellants' construction of the statute also fails to accord with the joint purposes of the 1956 legislation-to provide some assurance that landowners could count on a long-term supply of water, while preserving the Secretary's flexibility to employ short-term water service contracts. Under the appellants' interpretation of the word "term" in the statute, the Bureau of Reclamation could not enter into a short-term water service contract with a renewal clause that would assure the landowner of a stable water supply for a period greater than 10 years. Such a contract, in the appellants' view, would automatically become a long-term contract convertible to a repayment contract. If that interpretation of the statute were correct, it would foreclose the Secretary from using short-term water service contracts while at the same time providing some form of assurance to the holders of such contracts that their access to water would not terminate after 10 years. In directing the Secretary of the Interior to address the concern of long-term contract holders regarding the stability of their water supply, it is unlikely that Congress intended to strip

the Secretary of any authority to provide similar assurances to holders of short-term water service contracts. We therefore hold that the word "term" in the appellants' contracts refers to the designated 10-year term set forth in the contracts and does not include any periods of renewal following that initial 10-year term.

B

The appellants' second argument for disregarding the 10-year limitation is that the word "term" in the contracts is not a reference to the contract term per se, but instead refers to the period within which the government expects to recoup its fixed costs. The annual per-acre charge paid by the appellants consists of a construction component, which remains fixed, and an operation and maintenance component, which varies from year to year. The Bureau of Reclamation calculated the annual construction component ($1.70 per acre) by amortizing the total construction cost per acre of irrigated land ($85 per acre) over a 50-year period. The appellants argue that the "term" of their contracts is 50 years because that is the period within which the government will have recovered the construction costs apportioned to the appellants.

The problem with that argument is that the appellants' contracts do not in any way tie the contract "term" to the government's recovery of construction costs. Article 6 clearly provides that the contracts "shall continue for a period of 10 years,"

with the possibility of being renewed for "additional like periods." Although the contracts set the annual construction component at $1.70 per acre, they omit any mention of the total per acre construction costs that were apportioned to the appellants. Since the contracts themselves do not admit of any method for calculating the repayment period, there is no basis for concluding that the parties intended the contract "term" to be a 50-year repayment period.

Similarly, there is no indication that Congress intended the "term" of a 9(e) contract to be equal to the number of years it would take the Bureau of Reclamation to recover its construction costs. For 9(d) contracts, the contract term is closely tied to the repayment period because the statute expressly requires the irrigation district or water users' association to assume a "general repayment obligation" that "shall be spread in annual installments ... over a period of not more than 40 years." 43 U.S.C. § 485h(d)(3). Under a 9(e) contract, by contrast, the landowner assumes liability only for a variable annual charge for the delivery of irrigation water. The only temporal limitation on 9(e) contracts to furnish water is that

> [e]ach such contract shall be for such period, not to exceed forty years, ... as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper....

Id. § 485h(e). Because there is no reference to a repayment obligation in section 9(e), the period within which the government may recover its costs is not relevant to determining the "term" of any contracts executed pursuant to that provision.

Accordingly, we conclude that the appellants' contracts are not long-term contracts within the meaning of section 485h-3 and are therefore not entitled to the benefits accorded to such contracts under section 485h-1.

V

We next turn to the appellants' theory that even if their contracts are short-term contracts, they nonetheless should be treated as "repayment contracts," as that term is used in the 1939 Act. If their contracts are repayment contracts, the appellants assert that they are entitled by statute to operate and manage the irrigation works and to receive credit toward their general repayment obligation for any past overcharges.

According to the appellants, a repayment contract is any contractual arrangement in which the United States recoups the construction costs of a reclamation project. Because the water use charges in the appellants' contracts include a construction component, the appellants argue that their contracts must be repayment contracts. More broadly, they contend that because both sections 9(d) and 9(e) direct the Secretary to set water rates in part based

on project construction costs, contracts under both sections 9(d) and 9(e) are all repayment contracts.

The first problem with the appellants' theory is that it is contrary to the very first sentence of section 9(e). That subsection begins, "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) ... the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes." The effect of that sentence is to identify 9(d) contracts as "repayment contracts" and 9(e) contracts as water service contracts.

That straightforward reading of the statute is consistent with the legislative background. Prior to 1956, irrigation districts and landowners voiced their concern that section 9(e) seemed to be a departure from the general principle of reclamation law that landowners would acquire statutory management and water rights when the construction costs of the project had been repaid. While Congress was mindful of those concerns when it enacted the 1956 legislation, the committee reports confirmed that the "so-called water service or utility type contracts as authorized by the Reclamation Project Act of 1939 represented an innovation in reclamation law" and that "the principles of the two sections [9(d) and 9(e)] are generally accepted." S. Rep. No. 84-2241, at 2 (1956). The reports further explained that the 1956 Act was merely "directed toward perfecting the basis for the administration" of sections 9(d) and 9(e) of the 1939 Act, while "avoid[ing] any amendment to the text" of those sections. *Id.* Although Congress supplemented section 9(e) in several material

respects in the 1956 Act, it clearly did not discard the water service or utility-type contract that was embodied in that section.

The 1956 Act carefully set forth a series of statutory benefits that apply to "longterm" contracts, which are defined as contracts having a term of greater than 10 years. 43 U.S.C. §§ 485h-1 to 485h-3. In many respects, those benefits were designed to replicate the features of contracts under section 9(d) of the 1939 Act, which are clearly repayment contracts. Significantly, however, Congress did not simply relabel "long-term" contracts as "repayment contracts"; nor did it extend repayment-type benefits to holders of short-term 9(e) contracts.

Excluding 9(e) contracts from the class of "repayment contracts" is not inconsistent with the various statutory provisions cited by the appellants as support for their argument. A "repayment contract" is defined as "any contract providing for payment of construction charges to the United States." 43 U.S.C. § 485a(e). "Construction charges" are defined, in turn, as "the amounts of principal obligations, payable to the United States." *Id.* § 485a(d). The 1939 Act expressly states that 9(d) repayment contracts include a "general repayment obligation." *Id.* § 485h(d)(3). Holders of 9(e) contracts, however, are not required to assume a "general repayment obligation" or any other "principal obligation." Instead, their payments reflect "an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to

irrigation." *Id.* § 485h(e). The use of the term "fixed charges" in section 9(e), rather than "construction charges," "principal obligation," or "general repayment obligation," indicates that Congress did not intend 9(e) contracts to be classified as repayment contracts.

As we noted above, in calculating the amount of the "fixed charge," the Secretary is required to give "due consideration ... to that part of the cost of construction of works connected with water supply and allocated to irrigation." 43 U.S.C. § 485h(e). As with any utility-type contract, however, the consumer does not assume an obligation to repay the construction costs of the utility merely because the utility takes into account its fixed infrastructure costs in setting the price for its commodity service. The direction to the Secretary to account for "the cost of construction" simply reflects Congress's judgment as to the amount of revenue that ought to be generated by 9(e) contracts.

The appellants point to section 7(b) of the 1939 Act, 43 U.S.C. § 485f(b), as support for the proposition that any contract executed pursuant to section 9(e) is a repayment contract. Section 7(b) authorizes the Secretary of the Interior to enter into a "repayment contract ... in accordance, as near as may be, with the provisions [of sections 9(d) or 9(e)]" for any project under construction on the effective date of the 1939 Act. In the appellants' view, it would be inconsistent with the text of section 7(b) to hold that 9(d) contracts are repayment contracts but 9(e) contracts are not.

Section 7(b) does not, as the appellants contend, implicitly define the nature of any contracts executed under the authority of sections 9(d) and 9(e). The references to sections 9(d) and 9(e) merely specify the various provisions in the 1939 Act that the Secretary must consider when relying on section 7(b), which constitutes an independent source of the Secretary's authority to enter into a repayment contract. Although section 9(e) generally sets forth the statutory basis for the Secretary's authority to enter into water service contracts, and not repayment contracts, that subsection also provides that:

> In the event such contracts [under section 9(e)] are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project shall be covered by a repayment contract entered into pursuant to subsection (d) of this section.

43 U.S.C. § 485h(e). In light of that passage, the reference to section 9(e) simply confirms that the Secretary, when using his authority under section 7(b), should use a repayment contract in connection with "irrigation water distribution works," such as canals and laterals, just as section 9(e) directs him to do for such projects generally.

The appellants argue that short-term contracts were already "repayment contracts" under the 1939 Act and that their status as such was unaffected by the 1956 Act, notwithstanding that the later-enacted statute extended a number of repayment-type

benefits to long-term 9(e) contracts. It would be incongruous, however, to attribute to Congress the intent to provide greater benefits to short-term contracts than to longterm contracts. For example, one of the benefits conferred by the 1956 Act is that longterm contracts may be converted to 9(d) contracts "under stated terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(2). Under the appellants' theory, short-term contracts are entitled to be treated as 9(d) contracts even absent an agreement with the Secretary of Interior. It is clear that in the 1956 Act Congress intended to grant certain benefits to long-term contract holders that were not previously available. Congress's silence on the subject of short-term 9(e) contracts compels the conclusion that those contracts were not intended to have benefits comparable to those of long-term 9(e) contracts, much less those of 9(d) contracts.

In addition to the language of section 9(e) itself, there is ample contextual support in the 1956 Act for the distinction between short-term 9(e) contracts, on the one hand, and 9(d) and long-term 9(e) contracts, on the other. For example, Section 1(4) of the 1956 Act provides in pertinent part

> that the other party to any contract entered into pursuant to [section 9(d)] or to any long-term contract entered into pursuant to [section 9(e)] shall ... have a first right (to which right the rights of the holders of any other type of irrigation water contract shall be subordinate) to a stated share or quantity of the project's available water supply for

> beneficial use on the irrigable lands within the boundaries of, or owned by, the party....

43 U.S.C. § 485h-1(4). Congress clearly contemplated a residual category of "irrigation water contracts" that would not be entitled to the same water rights as 9(d) contracts and long-term 9(e) contracts. In the absence of any specific exclusion for short-term 9(e) contracts, there can be little doubt that short-term 9(e) contracts fall within the category of "irrigation water contracts" that were intended to be treated differently from 9(d) contracts and long-term 9(e) contracts.

The appellants further argue that the distinction between short-term and longterm contracts under section 9(e) mirrors the distinction between "toll-charge" contracts and repayment contracts under section 9(d). The 1939 Act authorized the Secretary of the Interior to provide for a "development period" of up to 10 years before triggering the landowners' repayment obligation under a 9(d) contract. 43 U.S.C. § 485h(d)(1). During the development period, the landowners were expected to pay a "toll charge" for the delivery of project water. *Id.* According to the appellants, the Secretary of the Interior lacks the authority to enter into a short-term 9(e) contract except for the purpose of a development period; they argue that when a short-term 9(e) contract is in place for more than 10 years it must be converted into a long-term 9(e) contract.

While it is true that Congress has chosen 10 years as the maximum allowable duration for both development periods and short-term contracts, that fact standing alone does not justify the inference that

the appellants press upon us. Nothing in either the text or legislative history of the 1939 Act suggests that Congress intended short-term 9(e) contracts to serve only as analogues to the toll-charge contracts authorized under section 9(d) for development periods. We therefore reject the suggestion that the Secretary cannot execute a short-term contract under section 9(e) except for the period authorized for a "development period" toll-charge contract.

The appellants next contend that the United States is collaterally estopped from denying that their contracts are repayment contracts because the Ninth Circuit already decided that issue in *Flint v. United States*, 906 F.2d 471 (9th Cir. 1990). In *Flint*, landowners in the Quincy Basin area challenged the operation and maintenance charges in their water service contracts, which are identical to the contracts at issue in this appeal. The *Flint* court held that: (1) the amounts charged by the Secretary of the Interior were committed to his discretion; (2) the Secretary did not exceed his authority under state law in assessing the charges; and (3) the plaintiffs had no property interest in the artificially stored groundwater that could be taken by the United States. 906 F.2d at 476-77. While the court in *Flint* referred to the contracts as "repayment contracts," there is no indication that the issue of the character of the contracts was briefed by the parties or that the court intended to address that legal issue. Accordingly, we conclude that the question whether the appellants' contracts are repayment contracts was neither litigated nor decided in the prior proceeding and that the court's characterization of

the contracts is therefore not binding on the government in this case. *See, e.g.*, *Killeen v. Office of Pers. Mgmt.*, 558 F.3d 1318, 1323 (Fed. Cir. 2009).

We therefore reject the appellants' argument that their contracts are "repayment contracts," as defined in section 2(e) of the 1939 Act, 43 U.S.C. § 485a(e).

VI

The appellants next argue that even if their contracts do not include an obligation to repay the government's construction costs, the Bureau of Reclamation is constrained by its earlier determination that their contracts are entitled to the statutory benefits reserved for repayment contracts and long-term 9(e) contracts. Because the appellants' assertions in that regard focus on the Bureau's enforcement of excess land limitations, we briefly recount the historical development of those limitations in reclamation law.

As part of a general policy to encourage settlement in the western states, Congress designed the Reclamation Act of 1902 to provide federally subsidized water to small, family-sized farms. To promote that objective, Congress provided in section 5 of the 1902 Act that "[n]o right to the use of water ... shall be sold for a tract exceeding 160 acres to any one landowner." 43 U.S.C. § 431. Congress later directed that project water would be withheld from any lands in excess of 160 acres in single ownership unless the owner executed a recordable contract to

sell excess land at a discount price that did not reflect the appreciation in value attributable to the availability of project water. *Id.* § 423e. Over time, the Bureau of Reclamation came to accept certain practices that were designed to avoid the 160-acre limitation, such as executing recordable contracts under a trust or limited partnership arrangement and increasing the acreage serviced by project water by leasing irrigated property that exceeded 160 acres. *See, e.g.*, *Peterson v. Dep't of the Interior*, 899 F.2d 799, 801-02 (9th Cir. 1990); 4 Robert E. Beck, *Water & Water Rights* 41-19 (1991); Trelease & Gould, *supra*, at 697.

In the Reclamation Reform Act of 1982, Title II of Pub. L. No. 97-293, 96 Stat. 1261, codified at 43 U.S.C. §§ 390aa-390zz ("RRA"), Congress closed several of the loopholes that landowners had previously used, while it also increased the total number of acres, whether owned or leased, to which project water could be delivered on a subsidized, or "non-full cost," basis. Holders of excess lands could nonetheless receive project water if they executed recordable contracts disposing of the excess lands within a reasonable time or if they were willing to pay "full cost" for water delivered to those lands. 43 U.S.C. §§ 390ee, 390ii. The most controversial provision of the RRA was the so-called "hammer clause," which put landowners with existing water supply contracts to a choice: They either had to amend their contracts to conform to the requirements of the RRA or continue to accept project water under their current contracts but pay the government's "full cost" of delivering water to leased lands in excess of

160 acres. *See id.* § 390cc(b); *Peterson*, 899 F.2d at 801.

The appellants point out that the Bureau of Reclamation has repeatedly required them to execute short-term 9(e) contracts incorporating all of the excess land limitations in the RRA and pre-1986 reclamation law. Because those limitations have been enforced against the appellants, they argue that the Bureau has effectively deemed their contracts sufficient to trigger the statutory benefits granted to repayment contracts and long-term 9(e) contracts. The appellants' argument depends on the assumption that the RRA and the pre-1986 excess land limitations apply only to repayment contracts and long-term 9(e) contracts. As we have already decided, however, the appellants' contracts are short-term 9(e) contracts because they have 10-year terms and because they do not contemplate a "general repayment obligation." Thus, the appellants are essentially arguing that the Bureau erred in applying the excess land limitations to their contracts, but that having done so the Bureau must extend to them the benefits of repayment contracts and long-term 9(e) contracts.

We need not decide whether the RRA and pre-1986 excess land limitations apply to short-term 9(e) contracts, because it is clear that applying those provisions to the appellants' contracts did not affect either the 10-year term of their contracts or their obligation to pay a water rental charge. The appellants do not contend that the RRA and pre-1986 excess land limitations require the execution of a repayment contract or a long-term 9(e) contract, at

least where such contracts were not already in effect. Nor do they contend that the excess land statutes grant the Secretary of the Interior discretionary authority to enter into a repayment contract or a long-term 9(e) contract where none existed before. *See, e.g.*, 43 U.S.C. §§ 390cc(d), 390ee(b).

To be sure, both the RRA and pre-1986 excess land laws give rise to legal consequences that depend on the type of contractual arrangement entered into by the parties. By way of example, the RRA applies only to a "repayment or water service contract between the United States and a district providing for the payment of construction charges to the United States including normal operation, maintenance, and replacement costs pursuant to Federal reclamation law." 43 U.S.C. § 390bb(1). Also under the RRA, the ownership and "full cost" limitations cease when "the obligation of a district for the repayment of the construction costs of the project facilities used to make project water available for delivery to such lands shall have been discharged by a district." *Id.* § 390mm(a). However, while the issue the appellants raise may go to what their obligations are under the RRA, that issue does not affect the nature of their contracts with the Bureau of Reclamation.

It may be that the Bureau of Reclamation erred in enforcing the excess land laws against the appellants' contracts. But the appellants have not squarely presented that issue to us, nor did they present it to the district court; it is therefore not before us, and we do not decide that question. *See Novosteel SA v. United States*, 284 F.3d 1261, 1273-74 (Fed. Cir. 2002). Because we are concerned only with

whether the appellants are entitled to the statutory benefits accorded to repayment contracts and long-term 9(e) contracts under the 1939 and 1956 Acts, and because those benefits turn on whether the appellants' contracts include a principal repayment obligation or have a contract term greater than 10 years, it is sufficient to note that the RRA and the pre-1986 excess land limitations do not change the fact that the appellants hold short-term 9(e) contracts.

Accordingly, we affirm the district court's decision granting the government's motion to dismiss the action.

VII

The appellants have also challenged the district court's denial of their motion to strike certain affidavits that were attached as exhibits to the government's opposition to their motions for summary judgment. After granting the government's motion to dismiss, the district court denied "all other pending motions," including the appellants' motion to strike, as moot. Because we affirm the district court's dismissal on the merits, and because the district court did not rely on any of the contested affidavits that were the subject of the motion to strike in connection with the dismissal order, we need not address the appellants' contention that the district court should not have denied their motion or should not have treated it as moot.

Each party shall bear its own costs for this appeal.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CV-06-204-RHW

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT (GCBSID), a Washington municipal corporation; and Williamson Land Company, a Washington Corporation,

v.

UNITED STATES of America; Bureau of Reclamation; Dirk Kempthorne, Secretary of the Interior of the United States of America; William E. Rinne in his individual capacity; William E. Rinne, Acting Commissioner of the Bureau of Reclamation; J. William McDonald in his individual capacity; J. William McDonald, in his capacity as Regional Director of the Pacific Northwest Region of the Bureau of Reclamation.

March 7, 2008.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS; DENYING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

ROBERT H. WHALEY, Chief Judge.

Before the Court are Plaintiffs' Motion for Partial Summary Judgment Re: Payout and Pricing Entitlements (Ct. Rec. 24); Plaintiffs' Motion for

Partial Summary Judgment: ASGW Irrigator O & M Overpayment Crediting Entitlements (Ct. Rec. 38); and the Federal Defendants' Motion to Dismiss and, alternatively, Motions for Judgment on the Pleadings (Ct. Rec. 76).

A hearing was held on the motions on October 18, 2007, in Spokane, Washington. Plaintiffs were represented by Ronald Ady and Ronald Christensen. Defendants were represented by Rolf Tangvald and Clark Miller.

The briefing on the pending motions is extensive and the issues presented to the Court are complex. At the heart of Plaintiffs argument is that the federal reclamation laws demand that they be treated equitably as compared to other federal reclamation participants. Specifically, Plaintiffs argue that federal law mandates that the Bureau of Reclamation must credit Plaintiffs' payment of construction charges to repayment of project costs; credit Plaintiffs' overpayment of operations and maintenance charges to repayment of project costs; refund any excess operations and maintenance payments made by Plaintiffs and grant certificates of final payment upon payout and certificates of partial release of land use lien restrictions; grant certificate of water rights upon payout of project construction costs; grant management of Plaintiffs' "Artificially Stored Ground Water" ("ASGW") § 9(e) contracts to Grant County Black Sands Irrigation District; and provide low cost power to Plaintiffs. Plaintiffs argue that partial summary judgment in favor of Plaintiffs is appropriate regarding payout and pricing

entitlements and for operation and maintenance overpayment crediting entitlements.

The Federal Defendants argue the Court lacks jurisdiction over Plaintiffs' complaint for three reasons: (1) Plaintiffs' Second Amended Complaint seeks relief under the Administrative Procedure Act (APA) that the Tucker Act, 28 U.S.C. § 1491(a)(1) impliedly forbids (Sovereign Immunity Argument); (2) Plaintiffs' Complaint does not raise a cognizable claim under the APA because it fails to identify any reviewable final agency action and/or fails to identify a final agency action that BOR had a non-discretionary duty to take, but failed to take; and (3) Plaintiffs' claims are not ripe.

BACKGROUND

The background of the Columbia Basin Project, which is the backdrop for this instant action, is set forth in *Flint v. United States*, 906 F.2d 471 (9th Cir. 1990). The Court incorporates the factual background as set forth in that opinion. Plaintiffs in this case are the Grant County Black Sands Irrigation District ("GCBSID"), a Washington municipal corporation, and Plaintiff Williamson Land Company, a landowner who holds section 9(e) contracts with the United States Bureau of Reclamation and pumps from wells for irrigation artificially stored ground water from beneath lands located in the Quincy Basin Ground Water Subarea,

which is within the Grant County Black Sands Irrigation District.[3] The Quincy Basis Ground Water Subarea lies within the boundaries of the Columbia Basin Project. Plaintiffs bring this class action suit on behalf of themselves and similarly situated persons.

There are 292 landowners within the Quincy Subarea that hold license agreements to pump ground water for irrigation. In all, the license agreements account for approximately 56,000 acres of land within the Quincy Subarea. GCBSID members who comprise the purported class Plaintiffs seek to represent include 85 landowners, or 29% of the total landowners within the Quincy Subarea.

DISCUSSION

Plaintiffs have filed two motions for partial summary judgment and the Federal Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b).

A. Standard of Review

Federal Rule of Civil Procedure Rule 12(b)(1) provides for motions to dismiss for lack of subject matter jurisdiction. The burden of proof on a Rule

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[3] Section 9(e) contracts are contracts between the ASGW Irrigators and the Bureau of Reclamation pursuant to 43 U.S.C. § 485(e).

12(b)(1) motion to dismiss is on the party asserting jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L. Ed. 2d 391 (1994). On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court is not "restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Subject Matter Jurisdiction

Defendants argue that the Court does not have subject matter jurisdiction to hear Plaintiff's complaint.

(1) Sovereign Immunity

Defendants argue that the United States has not waived its sovereign immunity with respect to the claims being brought by Plaintiff. "It is well settled that the United States is a sovereign, and as such, is immune from suit unless it has expressly waived such immunity and consented to be sued. Such waiver cannot be implied, but must be unequivocally expressed. Where a suit has not been consented to by the United States, dismissal of the action is required ... [because] the existence of such consent is a prerequisite for jurisdiction." *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1087 (9th Cir. 2007) (*quoting Gilbert v. DaGrossa*, 756 F.2d 1455, 1458

(9th Cir. 1985)). The scope of a waiver of sovereign immunity must be strictly construed in favor of the sovereign. *Id.* Plaintiffs have the burden of establishing that its claims fall within an unequivocally expressed waiver of sovereign immunity by Congress. *Id.* at 1088. Plaintiffs' action must be dismissed if it cannot meet this burden. *Id.*

Plaintiffs assert that they have pled two distinct claims under the Administrative Procedure Act: (1) a section 706(1) claim, which requires the Court to compel the Bureau to act where it has unlawfully withheld agency action; and (2) a section 706(2) claim that the Bureau violated reclamation law when it issued invoices to ASGW irrigators requiring them to pay construction, operation, and maintenance charges for their use of CBP ASGW water.

Section 702 of the APA provides the right for judicial review of agency actions. 5 U.S.C. § 702. Section 706 sets forth the scope of review. 5 U.S.C. § 706. According to the Ninth Circuit, section 702 of the APA waives sovereign immunity for Plaintiffs' claims if (1) the claims are not for money damages; (2) an adequate remedy for the claims is not available elsewhere; and (3) the claims do not seek relief expressly or impliedly forbidden by another statute. *Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998).

Defendant argues that the relief sought by Plaintiffs is unavailable under the section 702 waiver of sovereign immunity because the Tucker Act impliedly forbids equitable relief for contract-based claims.

The Tucker Act states:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort ...

28 U.S.C. § 1491(a)(1).

Courts have held that neither the Tucker Act nor the Little Tucker Act[4] permit a district court to grant equitable or declaratory relief in a contract dispute case; however, a district court does have jurisdiction to hear claims for equitable relief based on statutory rights. *North Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993). Whether claims are contractually based for purposes of the Tucker Act depends "on the source of the rights upon which plaintiff bases its claims, and the type of relief sought (or appropriate)." *North Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994) (*citing Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967-68 (D.C. Cir. 1982)). Where claims asserted are based on a contract, seek a declaration of contract rights, or do not exist independent of a contract, they are barred by the

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[4] The district court has concurrent jurisdiction with the claims court for actions not exceeding $10,000. 28 U.S.C. § 1346(a)(2). ("Little Tucker Act").

Tucker Act. *Tucson Airport Auth.*, 136 F.3d at 646-47.

The Court finds that the basis for Plaintiffs' claims is statutory, based on the federal reclamation laws. Thus, the Tucker Act does not preclude a section 702 waiver of sovereign immunity. However, before the APA waiver of immunity applies, Plaintiffs must state a valid claim under the APA. *E.J. Friedman Co., Inc. v. United States*, 6 F.3d 1355, 1359 (9th Cir. 1993).

(2) Administrative Procedure Act

Defendants argue that Plaintiffs' complaint does not raise a cognizable claim under the Administrative Procedure Act because it fails to identify a final agency action that the Bureau had a non-discretionary duty to take, but did not take and fails to identify any reviewable final agency action.

Action that is legally required can be compelled under the APA. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63, 124 S.Ct. 2373, 159 L. Ed. 2d 137 (2004) ("Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." (emphasis in original)). On the other hand, if the Bureau is not legally required to take a particular action, the Court does not have jurisdiction to order the Bureau to take action. *Id.*

Plaintiffs argue that the reclamation law strictly limits the Bureau's discretion and have identified the following discrete ministerial acts that the Bureau

has unlawfully withheld: (1) crediting Plaintiffs' payment of construction charges to repayment of project costs; (2) crediting Plaintiffs' over-payment of O & M to repayment of project costs; (3) refunding any excess O & M payments made by Plaintiffs; (4) granting certificates of final payment upon payout and certificates of partial release of land use lien restrictions; (5) granting certificates of water right upon payout of project construction costs; (6) granting management of the Plaintiffs' ASGW 9(e) contracts to Grant County Black Sands Irrigation District; and (7) providing low cost power to Plaintiffs ASGW irrigators. The benefits that Plaintiffs are seeking are found in sections 485h-1-5 of the 1956 Amendments to the federal reclamation laws. 43 U.S.C. § 485h-1-5. Plaintiffs argue that all contracts for ASGW executed pursuant to section 9(e) of the federal reclamation laws are "repayment contracts" subject to the requirements and benefits accorded repayment contracts under Federal Reclamation law, specifically those found in 43 U.S.C. § 485h-1-5.

The problem with this argument is that section 9(e) does not treat all contracts executed pursuant to this section as "repayment contracts." On the contrary, the section specifically refers to either "short- or long-term contracts." Pursuant to section 485h-3, a long-term contract is defined to mean any contract the term of which is more than ten years. Section 485h-1 permits the Secretary to convert long-term section (e) contracts to section (d) contracts. There is nothing in section 485h-1-5 that authorizes the Secretary to convert a short-term (e) contract to a section (d) contract. Likewise, there is nothing in this

section that would authorize the Secretary to provide the benefits Plaintiffs are seeking to short-term contracts. Plaintiffs' interpretation of section 485h(e) is belied by the explicit provisions of section 485h-1-5.

Also, section 9(e) contains no language requiring that the rates set by the Secretary for furnishing water also cover the repayment of construction costs. § 485h(e).

In their motions for summary judgment, Plaintiffs read the following provisions of the reclamation law as strictly limiting the Bureau's discretion to enter into short-term contracts: 16 U.S.C. § 835; 43 U.S.C. §§ 372, 390, 390h, 390dd, 390ee, 390hh, 391, 415, 419, 423e, 431, 461, 469, 470, 485a, 485f(b) 485h(a)-(f), 491-42, 498, 543-45; 43 C.F.R. §§ 426, 426.1, 426.2, 426.5, 426.23. Plaintiffs argue that these sections of Reclamation law require the Bureau to fix an equitable and appropriate construction obligation for the ASGW irrigators to repay or payout through equitable and appropriate allocation of a share of United States construction costs to be reimbursed or repaid, to credit all construction payments made toward payout of that construction obligation, and to end all construction charges when so paid out. The Court has carefully reviewed these provisions, along with Plaintiff's arguments and concludes that collectively, these provisions do not require the Bureau to do what Plaintiffs are asking this Court to order the Bureau to do.

Plaintiffs take issue with the fact that the contracts include a construction charge. Such a charge comports with section 485h(e), which permits

the Secretary to set rates in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation. The rate can include a portion of the cost of construction connected with the water supply and allocated to irrigation. On the other hand, nowhere in the statute does it state that if such a construction charge is assessed, the contract becomes a "repayment" contract or a contract that is covered by 485h-1. Inclusion of the construction charge in the § 9(e) contract does not violated federal reclamation law.

Plaintiff also argue that the reclamation laws demand that they be treated equally at the three districts. The Court disagrees. On the contrary, the reclamation laws provide that the water users be treated differently, depending on the type of contract that is entered into with the users and the Bureau. Moreover, as Defendants point out, there are unique differences between the water districts and the individual license-holders, including their histories, their systems, as well as their entitlements and obligations.

The Court finds that Congress expressly gave the Bureau discretion to enter into short-term contracts to furnish water for irrigation. Plaintiff's arguments to the contrary are without merit. As such, Plaintiffs' claim under § 706(1) fails as a matter of law.

The Court also finds that Plaintiffs have failed to identify any reviewable final agency action and therefore has not stated a cognizable claim under § 706(2). The issuing of invoices do not meet the statutory definition of "agency action." *See Oregon Natural Desert Ass'n v. United States Forest Service*, 465 F.3d 977 (9th Cir. 2006). Nor is the filing of an answer to the complaint filed by Plaintiff GCBSID in the 2003 lawsuit a reviewable final agency action.

Because Plaintiffs have failed to establish a claim under the APA, they are not entitled to an APA waiver of sovereign immunity.

(3) Plaintiff's Remaining Claims

Plaintiffs argue that regardless of whether the APA provides a waiver of sovereign immunity, their claims for quiet title, mandamus, and based on the 1950 Act either provide waivers of sovereign immunity that operate independent of the APA, or require no waiver of sovereign immunity by the United States. Notwithstanding these arguments, the Court finds that Plaintiffs have not shown that the Government has unequivocally waived its sovereign immunity and consented to be sued. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L. Ed. 2d 40 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver. The terms of consent to be sued may not be inferred, but must be

'unequivocally expressed,' in order to 'define a court's jurisdiction.' ") (citations omitted).

(4) Conclusion

Plaintiffs have not met their burden of establishing that Congress has expressly waived the United States' sovereign immunity and consented to be sued with respect to the claims asserted against it in Plaintiffs' Second Amended Complaint. As such, Plaintiffs' action is dismissed.

Accordingly, IT IS HEREBY ORDERED:

1. Federal Defendant's Motion to Dismiss, and, alternatively, Motion for Judgment on the Pleadings (Ct. Rec. 76) is GRANTED.

2. Plaintiffs' Motion for Partial Summary Judgment Re: Payout and Pricing Entitlements (Ct. Rec. 24) is DENIED.

3. Plaintiffs' Motion for Partial Summary Judgment: ASGW Irrigator O & M Overpayment Crediting Entitlements (Ct. Rec. 38) is DENIED.

4. Plaintiffs' Motion to Certify Class (Ct. Rec. 14) is DENIED, as moot.

5. All other pending motions are DENIED, as moot.

6. The above-caption claims asserted against the Federal Defendants are dismissed, with prejudice.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, provide copies to counsel, and close the file.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-1354

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT (GCBSID) and WILLIAMSON LAND COMPANY,
Plaintiffs-Appellants,

v.

UNITED STATES, BUREAU OF RECLAMATION, KEN SALAZAR, Secretary of the Interior, ROBERT W. JOHNSON, in his capacity as Commissioner of the Bureau of Reclamation, J. WILLIAM MCDONALD, in his individual capacity, and J. WILLIAM MCDONALD, in his capacity as Regional Director of the Pacific Northwest Region of the Bureau of Reclamation,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Washington in case no. 06-CV-204, Chief Judge Robert H. Whaley.

ORDER

A petition for rehearing en banc having been filed by the Appellants, and a response hereto having been invited by the court and filed by the Appellees, and the matter having first been referred as a petition for rehearing to the panel that heard the

appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on February 24, 2010.

FOR THE COURT,
Jan Horbaly
Clerk

Dated: 02/17/2010

STATUTORY APPENDIX

I. Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 390

As amended and codified in Title 43 of the United States Code, the Reclamation Act of 1902 provides, in relevant part:

§ 372. Water right as appurtenant to land and extent of right

The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

§ 383. Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

§ 431. Limitation as to amount of water; qualifications of applicant

No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

§ 461. Determination of construction charges generally

The construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably.

II. Reclamation Act of 1912, Pub. L. No. 62-256, 37 Stat. 265

As amended and codified in Title 43 of the United States Code, the Reclamation Act of 1912 provides, in relevant part:

§ 541. When patent or final certificate issued

Any homestead entryman under the Act of June 17, 1902, known as the reclamation Act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation, and cultivation, submit proof of such residence, reclamation, and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation Act for homestead entrymen: Provided, That no such patent or final water-right certificate shall issue until after the payment of all sums due the United States on account of such land or water right at the time of the submission of proof entitling the homestead or desert-land entryman to such patent or the purchaser to such final water-right certificate.

§ 542. Reservation of lien for charges; enforcement of lien; redemption

Every patent and water-right certificate issued under this subchapter shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights. * * * *

§ 543. Certificate of final payment and release of lien

Upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect except the lien for annual charges for operation and maintenance.

III. Reclamation Project Act of 1939, Pub. L. No. 76-260, 53 Stat. 1187

As amended and codified in Title 43 of the United States Code, the Reclamation Act of 1939 provides, in relevant part:

§ 485. Declaration of policy

For the purpose of providing for United States reclamation projects a feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payments of construction charges which can be met regularly and fully from year to year during periods of decline in agricultural income and unsatisfactory conditions of agriculture as well as during periods of prosperity and good prices for agricultural products, and which will protect adequately the financial interest of the United States in said projects, obligations to pay construction charges may be revised or undertaken pursuant to the provisions of this subchapter.

§ 485a. Definitions

* * * *

(d) The term "construction charges" shall mean the amounts of principal obligations payable to the United States under water-right applications, repayment contracts, orders of the Secretary, or other forms of obligation entered into pursuant to the Federal reclamation laws, excepting amounts payable for water rental or power charges, operation and

maintenance and other yearly service charges, and excepting also any other operation and maintenance, interest, or other charges which are not covered into the principal sums of the construction accounts of the Bureau of Reclamation.

(e) The term "repayment contract" shall mean any contract providing for payment of construction charges to the United States.

§ 485h. New projects; sale of water and electric power; lease of power privileges

* * * *

(d) Delivery of water for irrigation; repayment contract prerequisites

No water may be delivered for irrigation of lands in connection with any new project, new division of a project, or supplemental works on a project until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States, in a form satisfactory to the Secretary, providing among other things—

(1) That the Secretary may fix a development period for each irrigation block, if any, of not to exceed ten years from and including the first calendar year in which water is delivered for the lands in said block; and that during the development period water shall be delivered to the lands in the irrigation block involved at a charge per annum per acre-foot, or other charge, to be fixed by the Secretary each year and to be paid in advance of delivery of water: Provided, That where the lands included in an irrigation block are for the most part lands owned by

the United States, the Secretary, prior to execution of a repayment contract, may fix a development period, but in such case execution of such a contract shall be a condition precedent to delivery of water after the close of the development period: Provided further, That when the Secretary, by contract or by notice given thereunder, shall have fixed a development period of less than ten years, and at any time thereafter but before commencement of the repayment period conditions arise which in the judgment of the Secretary would have justified the fixing of a longer period, he may amend such contract or notice to extend such development period to a date not to exceed ten years from its commencement, and in a case where no development period was provided, he may amend such contract within the same limits: Provided further, That when the Secretary shall have deferred the payment of all or any part of any installments of construction charges under any repayment contract pursuant to the authority of the Act of September 21, 1959 (73 Stat. 584), he may, at any time prior to the due date prescribed for the first installment not reduced by such deferment, and by agreement with the contracting organization, terminate the supplemental contract by which such deferment was effected, credit the construction payments made, and exercise the authority granted in this section. After the close of the development period, any such charges collected and which the Secretary determines to be in excess of the cost of the operation and maintenance during the development period shall be credited to the construction cost of the project in the manner determined by the Secretary.

(2) That the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization; and that the organization may vary its distribution of construction charges in a manner that takes into account the productivity of the various classes of lands and the benefits accruing to the lands by reason of the construction: Provided, That no distribution of construction charges over the lands included in the organization shall in any manner be deemed to relieve the organization or any party or any land therein of the organization's general obligation to the United States.

(3) That the general repayment obligation of the organization shall be spread in annual installments, of the number and amounts fixed by the Secretary, over a period of not more than 40 years, exclusive of any development period fixed under paragraph (1) of this subsection, for any project contract unit or, if the project contract unit be divided into two or more irrigation blocks, for any such block, or as near to said period of not more than forty years as is consistent with the adoption and operation of a variable payment formula which, being based on full repayment within such period under average conditions, permits variance in the required annual payments in the light of economic factors pertinent to the ability of the organization to pay.

(4) That the first annual installment for any project contract unit, or for any irrigation block, as the case may be, shall accrue, on the date fixed by the Secretary, in the year after the last year of the development period or, if there be no development

period, in the calendar year after the Secretary announces that the construction contemplated in the repayment contract is substantially completed or is advanced to a point where delivery of water can be made to substantially all of the lands in said unit or block to be irrigated; and if there be no development period fixed, that prior to and including the year in which the Secretary makes said announcement water shall be delivered only on the toll charge basis hereinbefore provided for development periods.

(e) Contracts to furnish water

In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a

project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to subsection (d) of this section.

§ 485j. Effect on existing laws

The provisions of previous Acts of Congress not inconsistent with the provisions of this subchapter shall remain in full force and effect.

IV. Reclamation Act of 1956, Pub. L. No. 84-643, 70 Stat. 483

As amended and codified in Title 43 of the United States Code, the Reclamation Act of 1956 provides, in relevant part:

§ 485h-1. Administration of repayment contracts and long-term contracts to furnish water; renewal and conversion; credit for payments; right to available water supply; rates; construction component

In administering subsections (d) and (e) of section 485h of this title, the Secretary of the Interior shall--

(1) include in any long-term contract hereafter entered into under subsection (e) of section 485h of this title provision, if the other contracting party so requests, for renewal thereof under stated terms and conditions mutually agreeable to the parties. Such terms and conditions shall provide for an increase or decrease in the charges set forth in the contract to reflect, among other things, increases or decreases in construction, operation, and maintenance costs and improvement or deterioration in the party's repayment capacity. Any right of renewal shall be exercised within such reasonable time prior to the expiration of the contract as the parties shall have agreed upon and set forth therein;

(2) include in any long-term contract hereafter entered into under subsection (e) of section 485h of this title with a contracting organization provision, if the organization so requests, for conversion of said

contract, under stated terms and conditions mutually agreeable to the parties, to a contract under subsection (d) of section 485h of this title at such time as, account being taken of the amount credited to return by the organization as hereinafter provided, the remaining amount of construction cost which is properly assignable for ultimate return by it can probably be repaid to the United States within the term of a contract under subsection (d) of section 485h of this title;

(3) credit each year to every party which has entered into or which shall enter into a long-term contract pursuant to subsection (e) of section 485h of this title so much of the amount paid by said party on or before the due date as is in excess of the share of the operation and maintenance costs of the project which the Secretary finds is properly chargeable to that party. Credit for payments heretofore made under any such contract shall be established by the Secretary as soon after July 2, 1956 as it is feasible for him to do so. After the sum of such credits is equal to the amount which would have been for repayment by the party if a repayment contract under subsection (d) of section 485h of this title had been entered into, which amount shall be established by the Secretary upon completion of the project concerned or as far in advance thereof as is feasible, no construction component shall be included in any charges made for the furnishing of water to the contracting party and any charges theretofore fixed by contract or otherwise shall be reduced accordingly;

(4) provide that the other party to any contract entered into pursuant to subsection (d) of section

485h of this title or to any long-term contract entered into pursuant to subsection (e) of section 485h of this title shall, during the term of the contract and of any renewal thereof and subject to fulfillment of all obligations thereunder, have a first right (to which right the rights of the holders of any other type of irrigation water contract shall be subordinate) to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within the boundaries of, or owned by, the party and a permanent right to such share or quantity upon completion of payment of the amount assigned for ultimate return by the party subject to payment of an appropriate share of such costs, if any, as may thereafter be incurred by the United States in its operation and maintenance of the project works; and

(5) Provide for payment of rates under any contract entered into pursuant to said subsection (e) in advance of delivery of water on an annual, semiannual, bimonthly, or monthly basis as specified in the contract.

(6) include a reasonable construction component in the rates set out in any long-term contract hereafter entered into under subsection (e) of section 485h of this title prior to amortization of that part of the cost of constructing the project which is assigned to be repaid by the contracting party.

§ 485h-3. "Long-term contract" defined

As used in sections 485h-1 to 485h-5 of this title, the term "long-term contract" shall mean any contract the term of which is more than ten years.

§ 485h-4. Application of State laws

Nothing in sections 485h-1 to 485h-5 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of such sections shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

§ 485h-5. Supplement to Federal reclamation laws

Sections 485h-1 to 485h-5 of this title shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

V. Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261

As amended and codified in Title 43 of the United States Code, the Reclamation Reform Act of 1982 provides, in relevant part:

§ 390bb. Definitions

As used in this subchapter:

(1) The term "contract" means any repayment or water service contract between the United States and a district providing for the payment of construction charges to the United States including normal operation, maintenance, and replacement costs pursuant to Federal reclamation law.

§ 390cc. New or amended contracts

(a) Generally

The provisions of this subchapter shall be applicable to any district which--

(1) enters into a contract with the Secretary subsequent to October 12, 1982;

(2) enters into any amendment of its contract with the Secretary subsequent to October 12, 1982, which enables the district to receive supplemental or additional benefits; or

(3) which amends its contract for the purpose of conforming to the provisions of this subchapter. * * * *

§ 390dd. Limitation on ownership

Except as provided in section 390ii of this title, irrigation water may not be delivered to—

(1) a qualified recipient for use in the irrigation of lands owned by such qualified recipient in excess of nine hundred and sixty acres of class I lands or the equivalent thereof; or

(2) a limited recipient for the use in the irrigation of lands owned by such limited recipient in excess of six hundred and forty acres of class I lands or the equivalent thereof;

whether situated in one or more districts.

§ 390ee. Pricing

(a) Delivery of irrigation water at full cost

Notwithstanding any other provision of law, any contract with a district entered into by the Secretary as specified in section 390cc of this title, shall provide for the delivery of irrigation water at full cost as defined in section 390bb(3) of this title to:

(1) a landholding in excess of nine hundred and sixty acres of class I lands or the equivalent thereof for a qualified recipient,

(2) a landholding in excess of three hundred and twenty acres of class I land or the equivalent thereof for a limited recipient receiving irrigation water on or before October 1, 1981; and

(3) the entire landholding of a limited recipient not receiving irrigation water on or before October 1, 1981 * * * *.

§ 390mm. Repayment of construction charges

(a) Ownership and pricing limitations inapplicable when repayment obligation has been discharged

The ownership and full cost pricing limitations of this subchapter and the ownership limitations provided in any other provision of Federal reclamation law shall not apply to lands in a district after the obligation of a district for the repayment of the construction costs of the project facilities used to make project water available for delivery to such lands shall have been discharged by a district (or by a person within the district pursuant to a contract existing on October 12, 1982), by payment of periodic installments throughout a specified contract term, including individual or district accelerated payments where so provided in contracts existing on October 12, 1982. * * * *

§ 390ww. Administrative provisions

(a) Existing Federal reclamation law

The provisions of Federal reclamation law shall remain in full force and effect, except to the extent such law is amended by, or is inconsistent with, this subchapter. * * * *

Supreme Court, U S
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No. 10-116

In the Supreme Court of the United States

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the holders of short-term water-service contracts issued pursuant to Section 9(e) of the Reclamation Project Act of 1939 (1939 Act), 43 U.S.C. 485h(e), are entitled to the same benefits as holders of repayment contracts issued pursuant to Section 9(d) of the 1939 Act, 43 U.S.C. 485h(d).

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In the Supreme Court of the United States

No. 10-116

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES BUREAU OF RECLAMATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 579 F.3d 1345. The relevant order of the district court (Pet. App. 39a-52a) is reported at 539 F. Supp. 2d 1292.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 2009. A petition for rehearing was denied on February 17, 2010 (Pet. App. 53a-54a). On May 13, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari until June 17, 2010. On June 7, 2010, the Chief Justice further extended the time until July 16, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This case involves two subsections of the Reclamation Project Act of 1939 (1939 Act), 43 U.S.C. 485 *et seq.* Those provisions authorize the Bureau of Reclamation (Bureau), an agency within the Department of the Interior, to enter into contracts to provide water for irrigation. Section 9(d) of the 1939 Act, 43 U.S.C. 485h(d),[1] governs "repayment contracts," *i.e.*, contracts pursuant to which the water user repays a portion of the construction costs of the reclamation project, over a period of time. Section 9(e), 43 U.S.C. 485h(e), provides that "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d)," the Secretary of the Interior may instead, "in his discretion, * * * enter into either short- or long-term contracts to furnish water for irrigation purposes." A "long-term contract" is a contract "the term of which is more than ten years." 43 U.S.C. 485h-3. Long-term contracts under Section 9(e) are governed by additional provisions of the reclamation statutes that do not apply to short-term contracts. See 43 U.S.C. 485h-1.

b. The contracts at issue in this case concern artificially stored groundwater from the Columbia Basin Project (Project), a multipurpose federal reclamation project constructed and managed by the Bureau. C.A. App. 99-100. Beginning at the Grand Coulee Dam on the mainstem of the Columbia River in central Washington State, the Project pumps large quantities of water from the river into a reservoir on a plateau above the river, at great expense, for agricultural irrigation purposes. *Id.* at 99. The Project's extensive irrigation works include

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[1] Petitioners and the courts below refer to Section 485h(d) and (e) as Section 9(d) and (e). For clarity, we do the same. See Sup. Ct. R. 34.5.

dams, reservoirs, pump stations, 282 miles of main canals, 1533 miles of lateral canals, and 636 miles of drains and wasteways. *Ibid.* These works extend 125 miles southward across the Columbia Plateau, to the confluence of the Snake and Columbia Rivers near Pasco, Washington. *Id.* at 99, 101 (map).

Congress authorized the Project in 1935. Act of Aug. 30, 1935, ch. 831, 49 Stat. 1038; see also 16 U.S.C. 835 (authorization of reclamation project). Construction of irrigation works began in the 1940s, once the Grand Coulee Dam was completed. The Project began delivering significant irrigation water in 1952. C.A. App. 100. By 1956, most but not all of the Project's primary features had been constructed; two primary canals in the Project's southern portion remain unfinished today. *Id.* at 99.

The Bureau diverts water from the Columbia River through the Project pursuant to a "Certificate of Water Right" issued by the Washington Department of Ecology. C.A. App. 516-517. The Bureau holds the Certificate to meet its current and future contractual commitments to the three major irrigation districts within the Columbia Basin Project. *Id.* at 474-475, 487-488, 680. In 1945, the Bureau executed repayment contracts under Section 9(d) with those three districts: the East Columbia Basin Irrigation District, the Quincy-Columbia Basin Irrigation District, and the South Columbia Basin Irrigation District (collectively, the Project Repayment Districts).[2] As amended in 1968, the contracts require the Project Repayment Districts to reimburse the Bureau for the operation and maintenance costs associated with the irrigation features of the Project. Those contracts also include an obligation for each Project Repayment

[2] The Project Repayment Districts are not parties to this case.

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District to fully repay its allocated share of Project capital construction costs in annual installments over a 50-year period. Gov't Supp. C.A. App. 1-5, 8-10, 15-21. In exchange, the Project Repayment Districts receive a variety of contractual concessions from the Bureau, including preference and priority as to the availability and usage of the Project water and Project works. C.A. App. 487-488. Thus, if the Project's southern portion is completed, the Project Repayment Districts would have a priority claim to the water made available if necessary to irrigate the additional lands.

c. As Project water (*i.e.*, developed water made available from federal reclamation facilities) is diverted from the Columbia River, conveyed to the Project Repayment Districts, and applied to irrigate lands in the Project's northern portion, some of that water seeps into the underlying soil and water table within an area known as the Quincy Ground Water Subarea. The water migrates southward through the soils of the Quincy Subarea, including the Black Sands region where petitioners or their patrons own lands. The water then resurfaces at the Bureau's Potholes Reservoir, where it is recaptured and impounded by O'Sullivan Dam. The Bureau uses this artificially stored groundwater to meet its commitments to the Project Repayment Districts in the Project's southern portion. See *Flint* v. *United States*, 906 F.2d 471, 473 (9th Cir. 1990); *Jensen* v. *Department of Ecology*, 685 P.2d 1068, 1072 (Wash. 1984); C.A. App. 525.

When the Project began operation in the 1950s, the Bureau classified the Black Sands area as non-irrigable because of the nature of the terrain and soils. The Bureau consequently constructed no irrigation delivery facilities (such as canals) in the area. During the mid-

1960s, however, the development of center-pivot sprinklers and the higher water table resulting from Project construction made the Black Sands area irrigable. Landowners on non-Project lands, including petitioners,[3] accordingly began to sink private wells and irrigate their lands using the Project's artificially stored groundwater. *Flint*, 906 F.2d at 473.

In 1973, the Washington State Department of Ecology began management of groundwater in the Quincy Subarea, including the artificially stored groundwater, and declared that no further public groundwater was available for appropriation. As a consequence, a dispute arose between the Bureau and certain landowners over the ownership of the artificially stored groundwater. The Department of Ecology and Washington Supreme Court resolved that dispute in the Bureau's favor and recognized the United States' ownership. *Flint*, 906 F.2d at 473; *Jensen*, 685 P.2d at 1071-1073; C.A. App. 527.

d. As a result of the adjudication in favor of the United States, the Department of Ecology promulgated regulations requiring landowners within the Quincy Subarea to obtain both a contract with the Bureau and a permit from the State before withdrawing groundwater. See *Flint*, 906 F.2d at 473. Rather than enter into repayment contracts like those it had executed with the three Project Repayment Districts pursuant to Section 9(d), the Bureau executed short-term water-service contracts under Section 9(e) (also known as "ASGW license agreements") with the Quincy Subarea landowners, al-

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[3] Petitioners incorrectly state (Pet. 6) that they own "project lands." They do not. Because their lands were determined to be non-irrigable, the Project did not encompass their lands.

lowing those landowners to withdraw artificially stored groundwater in the Quincy Subarea. C.A. App. 475-476.

Each contract is issued for a term of ten years, renewable for additional ten-year terms. Pet. App. 3a; C.A. App. 161. The contracts may be terminated at or short of the ten-year term for a number of reasons, including a failure to maintain a corresponding state permit or insufficient "quantities and availability" of water. *Id.* at 164-165. These short-term, interruptible Section 9(e) contracts thus allow petitioners to use Project water so long as it is available and so long as their use does not negatively affect the pre-existing contractual rights of the Project Repayment Districts.

In consideration for use of the artificially stored groundwater during this ten-year term, petitioners pay water-service charges to the Bureau. C.A. App. 162. Because Section 9(e) directs the Bureau to set "rates" that will cover "an appropriate share" of the "annual operation and maintenance cost" and of "such fixed charges as the [Bureau] deems proper," with "due consideration" given to capital construction costs, these water-service charges contain two components. The first represents a share of those costs associated with operating and maintaining Project works that supply artificially stored groundwater to the Quincy Subarea (75% of the estimated annual operations and maintenance costs of the three Project Repayment Districts). See *Flint*, 906 F.2d at 474 n.2; C.A. App. 162. The second reflects those costs associated with capital costs incurred by Project construction ($1.70 per acre). *Ibid.* But unlike the repayment contracts held by the Project Repayment Districts, petitioners' contracts do not contain *obligations* to repay allocated Project capital construction costs *in full*. Pet. App. 25a-33a.

2. Petitioner Williamson Land Company and patrons of petitioner Grant County Black Sands Irrigation District are among the landowners within the Quincy Subarea holding short-term contracts executed pursuant to Section 9(e). Petitioners brought this action against the Bureau in federal district court and sought, among other things, a declaration that they are entitled to the same benefits as holders of Section 9(d) repayment contracts, such as the Project Repayment Districts. C.A. App. 155-157 (2d Am. Compl. 31-33). They also sought monetary relief for alleged overpayments. *Id.* at 157.

The district court granted the Bureau's motion to dismiss. Pet. App. 39a-52a. The court concluded that the reclamation laws do not require the Bureau to provide petitioners with the same benefits as those provided to the three Project Repayment Districts that hold Section 9(d) repayment contracts. *Id.* at 48a-49a. The court stated that the statute, in fact, "provide[s] that the water users be treated differently, depending on the type of contract that is entered into with the users and the Bureau." *Id.* at 49a. Here, the court stated, "there are unique differences between the [Project Repayment D]istricts and the individual license-holders [*i.e.*, petitioners], including their histories, their systems, as well as their entitlements and obligations." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-38a.[4]

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[4] Before reaching the merits, the court of appeals first rejected the Bureau's argument that appellate jurisdiction properly lay in the Ninth Circuit. Pet. App. 5a-9a. If a district court's jurisdiction "was based, in whole or in part" on the Little Tucker Act, 28 U.S.C. 1346, the Federal Circuit has exclusive jurisdiction over appeals in the case. 28 U.S.C. 1295(a)(2). The court of appeals concluded that petitioners' claim was best characterized as one seeking (in part) monetary "damages" under a theory of unlawful exaction, and thus as within the Little Tucker Act, Pet. App. 7a; the government had argued that under this Court's

Petitioners argued in the court of appeals that they are entitled to the statutory benefits that holders of repayment contracts receive because: (1) their contracts actually are "long-term" Section 9(e) contracts that provide benefits similar to those of repayment contracts; (2) their contracts actually are repayment contracts, because the Bureau has no authority to enter into utility-type contracts that do not obligate their holders to fully repay capital construction costs; or (3) their contracts include a provision enforcing the acreage limitations of the Reclamation Reform Act of 1982 (RRA), 43 U.S.C. 390aa *et seq.*, and the RRA applies only to repayment contracts, so the Bureau must treat their contracts as repayment contracts. Pet. App. 9a-10a. After thoroughly recounting the historical development of reclamation law and the unique circumstances of the Columbia Basin Project, *id.* at 10a-18a, the court rejected each of those arguments and concluded that petitioners are not entitled to the same statutory benefits as the holders of Section 9(d) repayment contracts, *id.* at 18a-37a.

First, the court concluded that petitioners' contracts have an explicit ten-year term, not a "term of * * * more than ten years," as would be necessary to meet the definition in 43 U.S.C. 485h-3 of a long-term contract. See Pet. App. 18a-25a. The court rejected petitioners' argument that their contracts had terms longer than ten years because the contracts can be and have been renewed for additional ten-year terms. The court stated that a contract "term" should not be interpreted as including renewal periods, because such an interpretation

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decision in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), the refund of the alleged overpayments of capital construction costs that petitioners sought was equitable in nature and not "money damages." Gov't C.A. Br. 18-21.

would be "contrary to the most natural meaning of the word 'term,' as it is used in the contracts, and [because] it is also contrary to the parties' expressed intentions as to the matter and to the statutory and regulatory backdrop of the contractual arrangements at issue in this case." *Id.* at 20a.

Second, the court of appeals concluded that petitioners' short-term contracts were not repayment contracts, because petitioners had no obligation to fully repay Project capital construction costs. Pet. App. 25a-33a. The court rejected petitioners' argument that *all* contracts under Section 9(d) or (e) are repayment contracts and that the Bureau has no authority to enter into utility-type water-service contracts. It noted that this theory contradicted the plain language of Section 9(e), which states that "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d) . . . the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes." *Id.* at 26a. The purpose and effect of this language, the court concluded, is to distinguish Section 9(d) repayment contracts from Section 9(e) water-service contracts, which allow the Bureau to furnish water to users (such as petitioners) much as a public utility does. *Id.* at 26a-28a.

Finally, the court rejected petitioners' argument based on the RRA. Pet. App. 33a-37a. That statute imposes limitations on the acreage of a parcel that can be irrigated on a subsidized basis, and the Bureau enforces those "excess land" limitations against petitioners. *Id.* at 34a-35a. The court assumed, *arguendo*, that the excess-land limitations could apply only to holders of Section 9(d) repayment contracts or long-term Section 9(e) contracts, and that the Bureau therefore erred in

applying those limitations to petitioners as holders of short-term Section 9(e) contracts. *Id.* at 35a, 36a. The court noted, however, that even if these assumptions were correct, any error on the Bureau's part would affect only the enforceability of the excess-land limitations (something petitioners did not challenge); it would "not affect the nature of [petitioners'] contracts with the Bureau." *Id.* at 36a.

4. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. 53a-54a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, the petition raises a number of new issues that were not squarely presented below and were not passed on by the court of appeals. In any event, these new arguments are based on fundamental misunderstandings of federal reclamation and state water law. Further review is not warranted.

1. a. The court of appeals correctly applied the unambiguous provisions of the statute to the plain terms of petitioners' short-term Section 9(e) contracts. Reclamation law provides certain benefits to those who hold a specific type of contract, known as a repayment contract, that requires holders to repay allocated capital costs of constructing a reclamation project *in full* over a preset period of years. As the court of appeals correctly concluded, petitioners' agreements contain no obligation to repay allocated capital construction costs *in full*; thus, petitioners do not hold repayment contracts and are not entitled to the same benefits as those who hold repayment contracts. Pet. App. 25a-33a.

Certainly, as Section 9(e) directs, the Bureau considers fixed costs like construction costs when deciding on

the appropriate service rate to charge petitioners for use of water, just as a public utility would do. Pet. App. 27a-28a. That practice, however, does not mean that petitioners have an *obligation* to repay an allocated share of the Columbia Basin Project's capital construction costs in full. Petitioners may choose not to renew their Section 9(e) contracts at the end of the ten-year terms, in which case they would not have fully repaid capital construction costs. Congress did not provide holders of Section 9(e) contracts with the same benefits as those who do have such repayment obligations.

That Congress did not intend for all landowners to be treated like the holders of repayment contracts is evident in the plain text of the statute. The very first sentence of Section 9(e) declares that: "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes." 43 U.S.C. 485h(e). Thus, Section 9(e) contracts allow the Bureau to provide a utility-type service "to furnish water for irrigation purposes" *in lieu of* entering into a Section 9(d) contract that requires the full repayment of construction costs within the term of the contract.

Indeed, in amending the 1939 Act in 1956, Congress acquiesced in and acted upon the Bureau's long-standing interpretation of Section 9(e) as conferring discretion to enter into utility-type contracts that lack repayment obligations and benefits. Pet. App. 26a (citing S. Rep. No. 2241, 84th Cong., 2d Sess. 2 (1956) (1956 Senate Report)); accord H.R. Rep. No. 1754, 84th Cong., 2d Sess.

2 (1956).[5] As petitioners note (Pet. 25), in response to the Bureau's interpretation that Section 9(e) contracts are utility-type water-service contracts that do not entitle their holders to the benefits of repayment contracts, Congress amended reclamation law to enable holders of *long-term* Section 9(e) contracts to obtain benefits similar to those of repayment contracts. 43 U.S.C. 485h-1. Congress also provided a means for long-term Section 9(e) contracts to be converted to repayment contracts on "terms and conditions mutually agreeable to the parties." 43 U.S.C. 485h-1(2). Significantly, however, when acting upon the Bureau's interpretation, Congress "avoid[ed] any amendment to the text" of Section 9(e), Pet. App. 26a (quoting 1956 Senate Report 2); it did not in any way repudiate the Bureau's interpretation of its Section 9(e) authority to enter into utility-type short-term contracts.

Furthermore, in the 1956 amendments, Congress granted benefits *only* to holders of long-term Section 9(e) contracts and Section 9(d) repayment contracts. 43 U.S.C. 485h-1. It linked those benefits to the term of the contract—a matter within the Bureau's control—by defining the (previously undefined) term "long-term contract" to mean "any contract the term of which is more than ten years," 43 U.S.C. 485h-3. And the text of the benefits-creating statute expressly recognizes that some "irrigation water contract[s]" will be ineligible: Congress gave holders of long-term Section 9(e) contracts and Section 9(d) repayment contracts "a first right" to

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[5] Even if the statute were ambiguous, the Bureau's long-standing interpretation, since 1939, that Section 9(e) provides it with the discretion to enter into utility-type contracts that lack repayment obligations and benefits would be entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

project water and provided that "the rights of the holders of any other type of irrigation water contract shall be subordinate" to that first right. 43 U.S.C. 485h-1(4). If Congress had intended to provide the same benefits to all reclamation contract holders, or had intended to repudiate the Bureau's interpretation, it would not have created the short-term/long-term distinction or made certain contracts "subordinate" to other contracts in the 1956 Act.[6]

b. The foregoing also refutes petitioners' argument that their contracts should be read as having a "term of * * * more than ten years," as is necessary to be a long-term Section 9(e) contract. 43 U.S.C. 485h-3. Petitioners acknowledge that their contracts have a stated term of ten years, and they recognize (Pet. 27) that the court of appeals reasonably treated the word "term" to have "the ordinary meaning" of that word, *i.e.*, the definite time period set out in the contracts themselves, Pet. App. 20a. But they argue (Pet. 28) that "there is no reason to think that Congress would have intended" for that ordinary meaning to apply to *renewable* reclamation contracts. In fact, as discussed above, Congress gave the Bureau discretion to distinguish between short-term and long-term contracts, because it granted certain ben-

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[6] Petitioners contend (Pet. 29) that "prior to 1956 *all* landowners obtained a water right to project waters put to beneficial use." Even if that contention were relevant to whether petitioners hold short- or long-term contracts, it is incorrect. As shown above, in the 1939 Act, Congress provided the Bureau with discretion to enter into Section 9(e) water-service contracts "in lieu of" repayment contracts. More fundamentally, there is no uniform rule that irrigators who put federal reclamation water to beneficial use inevitably obtain a permanent right to that water. Rather, state law governs, and under Washington law, see pp 16-19, *infra*, petitioners have no right to the artificially stored groundwater from the Project.

efits only to holders of long-term Section 9(e) contracts and Section 9(d) repayment contracts, 43 U.S.C. 485h-1, and drew the clear line between short-term and long-term contracts at ten years, 43 U.S.C. 485h-3. Here, the Bureau used that authority to purposefully enter into interruptible ten-year contracts with petitioners so as not to interfere with the rights of the Project Repayment Districts, which have priority to the water at issue. Petitioners' reading, by contrast, would require *any* such renewable contract to be treated as a long-term one, irrespective of the term that the Bureau specified in the contract, unless it would definitely terminate in ten years or less. Petitioners give no reason why Congress would have so constrained the Bureau's authority.

The Columbia Basin Project illustrates why Congress gave the Bureau the flexibility to enter into short-term contracts that do not provide their holders with benefits, like "first right" and "permanent right" to the water, 43 U.S.C. 485h-1(4), that can be obtained by holders of other types of contracts. As mentioned above, p. 4, *supra*, the artificially stored groundwater in the Quincy Subarea, which moves beneath the Black Sands area on its way to the Potholes Reservoir, was committed to the Project Repayment Districts at the Project's unfinished southern portion in 1945, long before petitioners first sunk their wells in the mid-1960s. C.A. App. 487-488. Petitioners' short-term Section 9(e) contracts enable them to use Project water on non-project lands pending the Project's completion. Should the Bureau finish the Project, the water being used by petitioners on their non-project lands could be needed for Project purposes. Entering into additional contracts that provide "priority" and a "permanent right" to non-project landowners like petitioners would have jeopardized the

availability of water to Project landowners. Thus, while petitioners assert that the Bureau is depriving farmers of their rights, in reality the Bureau here is attempting to preserve the rights of farmers within the Project Repayment Districts, with whom it first entered into contracts.

c. Petitioners' reliance on the RRA is without merit. The RRA defines the term "contract"—for purposes of the RRA only, not the 1939 Act—to include "any repayment or water service contract between the United States and a district providing for the payment of construction charges." 43 U.S.C. 390bb(1). That definition does not aid petitioners. First, it reinforces the distinction between repayment contracts and water-service contracts like petitioners'. Second, as already discussed, petitioners' contracts "provid[e] for the payment of construction charges" as part of the formulation of a reasonable water-service fee. That consideration of construction costs does not make petitioners' contracts repayment contracts, nor did the 1982 enactment of the RRA change the established understanding of utility-type water-service contracts.[7] Third, it is not necessary to adopt petitioners' reading in order to give them some way to "escape" the RRA's acreage restriction (Pet. 31). In exchange for accepting the RRA's acreage limitations as terms of their contracts (Pet. 27 n.5), petitioners receive Project water at a price far below the cost of

[7] Petitioners assert (Pet. 8 n.2) that by treating their contracts as covered by the RRA, the Bureau formerly acknowledged that their contracts were repayment contracts. At most, the term "repayment contract" is sometimes used as a generic description for reclamation contracts. Nothing in the RRA changes the fact that petitioners' contracts do not fall within the 1939 Act's definition of repayment contract, because petitioners have no obligation to repay allocated capital construction costs in full.

providing it to them. Petitioners' acceptance of that bargained-for contractual arrangement following the RRA's adoption does not give them anything more than they previously enjoyed: an interruptible right to use Project water only while excess water is available to them. Should the Bureau complete the Project, then under the terms of petitioners' state-issued permits, petitioners' right to use the water must yield to the needs of the Project Repayment Districts.

d. In sum, the court of appeals correctly concluded that petitioners hold neither Section 9(d) repayment contracts nor long-term Section 9(e) water-service contracts that may be converted to repayment contracts, and thus they are not entitled to the benefits due to holders of such contracts. That holding does not warrant this Court's review.

2. Petitioners' principal contention does not attack the court of appeals' actual holding or the issues the parties briefed and argued below. Instead, petitioners argue for the first time that this Court's review is warranted because the court of appeals allegedly ignored the state-law concept of beneficial use, which petitioners now argue controls. That argument was not pressed or passed upon below; to the contrary, in the court of appeals, petitioners made the opposite contention. They argued that federal reclamation law, and not state law, "controlled the beneficial use of th[e] water" because state law allegedly was inconsistent with federal law. Pet. 3d Corrected C.A. Br. 30-31. An argument neither preserved nor decided below does not warrant this Court's review. See, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

In any event, the Bureau has agreed throughout this litigation that state law governs "the control, appropria-

tion, use, or distribution of water" used in irrigation. 43 U.S.C. 383. But that principle does not assist petitioners here: the water law of the State of Washington forecloses their arguments, because it secures to the United States a perfected right to all the water of the Columbia Basin Project, and petitioners cannot establish under state law a right that (as shown above) they lack under federal reclamation law.

In 1917, the State of Washington declared that, subject to existing water rights acquired under previous law, all waters within the State thereafter belonged to the public and any right to the water shall be acquired "only by appropriation for a beneficial use" and in the manner provided by the state water code. Wash. Rev. Code § 90.03.010 (2010). The state water code requires persons or entities desiring to appropriate public water for beneficial use first to obtain a permit from the state before using or diverting any such water. See *id.* §§ 90.03.250 (surface water), 90.44.050 (groundwater); Wash. Admin. Code § 173-134A-080(2) (2010). If the state issues the permit and the permit holder perfects its right to the water, the state will issue a "water right certificate" as proof of ownership of the right, and the water under that right is no longer available for appropriation by others through beneficial use. Wash. Rev. Code § 90.03.330 (2010).

Under this framework, the United States holds full legal title to the particular water rights at issue here. The State of Washington issued to the United States a Certificate of Water Right that entitles it to the water that the Bureau diverts for the Columbia Basin Project. C.A. App. 516-517. The artificially stored groundwater at issue is part of this right; it is not public water in which petitioners can acquire an appropriative right by

putting it to beneficial use. See Wash. Admin. Code § 173-134A-020 (2010); *Jensen* v. *Department of Ecology*, 685 P.2d 1068, 1071-1072 (Wash. 1984); see also *Flint* v. *United States*, 906 F.2d 471, 477 (9th Cir. 1990) (artificially stored groundwater from the Columbia Basin Project "is not there for the taking (by the landowner subject to state law), but for the giving by the United States") (citation omitted); *Department of Ecology* v. *United States Bureau of Reclamation*, 827 P.2d 275, 282 (Wash. 1992) (concluding that return flow water from a stream flowing within the boundaries of the Project belonged to the United States, and observing that "under Washington's statutes the decisions regarding distribution of water within a federal irrigation project do not belong to the State," but to the Bureau).

The State's regulatory framework recognizes that any interest in the artificially stored groundwater that petitioners might have or acquire would necessarily be subordinate to the prior interests of the United States and the Project Repayment Districts. See, *e.g.*, Wash. Admin. Code § 173-134A-140(2). For example, the state's regulations specific to the Quincy Subarea require that permits for the withdrawal of artificially stored groundwater "be conditioned to ensure that no withdrawal will interfere with the furnishing of adequate supplies of water to the Potholes Reservoir facility of the [B]ureau to satisfy existing and future project needs of the [B]ureau." *Id.* § 173-134A-080(2)(a); see also *id.* § 173-134A-040(2). The regulations also require that permits be conditioned upon the permit holder's compliance with the terms of an executed agreement with the Bureau for the use of the artificially stored groundwater, subject to termination for failure

to comply. *Id.* § 173-134A-080(2)(c); see also *id.* §§ 173-134A-130, 173-136-060(4). And the regulations also expressly state that "[n]othing in this chapter purports or is intended to modify any rights of an irrigation district created under a water delivery and 'repayment' contract between the United States and irrigation districts located within the Columbia Basin project." *Id.* § 173-134A-140(2).

Consistent with these regulations, petitioners' state-issued permits for withdrawal of artificially stored groundwater declare that such permits are subject to a "U.S. Bureau of Reclamation license." Gov't Supp. C.A. App. 23. The permits also provide that they are subject to the regulations protecting the water rights and needs of the Bureau, both present and future, for the Columbia Basin Project and its Potholes Reservoir, and that the permits do not "establish or embody rights to ground water." *Id.* at 24.

Petitioners' newfound reliance on the principle that state law governs the acquisition of water rights therefore is irrelevant to the disposition of this case. Under the plain terms of petitioners' state-issued permits and Washington's law and regulations pertaining to the Quincy Subarea, petitioners lack any permanent right to the Project groundwater that they receive.

3. Petitioners also seek support from several decisions of this Court and one decision of the Washington Supreme Court, several of which pre-date the adoption of the provisions of the 1939 Act that are controlling here. Nothing in those decisions sheds any light on the permissibility of the Bureau's use of water-service contracts to allow access to artificially stored groundwater to which the United States has a perfected right under Washington law. Indeed, none of those cases involved

groundwater at all. At most, those cases rejected the United States' claim to ownership of surface water under particular circumstances; they say nothing to contradict the fact that the United States has a perfected right to *this* groundwater.

Thus, in *Ickes* v. *Fox*, 300 U.S. 82 (1937), this Court held that the United States was not an indispensable party to a water-rights dispute because, under the terms of the applicable state law *and* reclamation contracts, the water rights were vested in the landowners and not in the United States. See *id.* at 93-94. Similarly, in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), "the terms of the law and of the contract" allowed state water users to appropriate the rights to the water, *id.* at 614, and this Court "intimate[d] no opinion" as to whether the United States could have kept all of the water rights for itself, *id.* at 615. So too in *Nevada* v. *United States*, 463 U.S. 110 (1983), in which "the law of the relevant State and the contracts entered into by the landowners and the United States" established that the landowners had a "'permanent water right.'" *Id.* at 126 & n.9 (citation and emphasis omitted). And in *Lawrence* v. *Southard*, 73 P.2d 722 (Wash. 1937), the United States (which was not a party) allegedly had attempted to acquire its own rights to waters of the Yakima River Project, but failed to perfect those rights in accordance with state law, and the United States' rights therefore were presumed to have yielded to a private party's appropriative right. See *id.* at 726-727, 728. Here, by contrast, the United States holds a valid certificate of water right from the State of Washington vesting in it ownership of the artificially stored groundwater. And in the context of this Project and of groundwater, the Bureau plays a different role than that of mere "carrier and distributor," *Fox*,

300 U.S. at 95. Even had the court of appeals addressed the proposition on which petitioners now rely, therefore, its affirmance of the district court's decision would not conflict with any decision of this Court or any other appellate court.

4. This case would not warrant review in any event. The decision of the court of appeals affects only short-term Section 9(e) contracts, which are rare outside this one reclamation project in central Washington State. The vast majority of the Bureau's contracts are Section 9(d) repayment contracts or long-term Section 9(e) water-service contracts, to which the statutory benefits set out in 43 U.S.C. 485h-1 unquestionably apply and for which the question presented here lacks any significance. For instance, the contracts used in the Central Valley and Klamath Projects, to which petitioners and their amici refer (Pet. 31-32; San Luis & Delta-Mendota Water Authority Amici Br. 16-18), are long-term Section 9(e) contracts.

The Bureau uses short-term Section 9(e) water-service contracts to furnish artificially stored groundwater to petitioners in the Quincy Subarea because of circumstances unique to the Columbia Basin Project. The groundwater at issue was contractually committed to the Project Repayment Districts at the Project's unfinished southern portion long before petitioners first sunk their wells. Because of the Project's unfinished nature and the often limited and unpredictable availability of water, the Bureau chose not to enter into perpetual contractual arrangements with petitioners; doing so could have jeopardized the availability of water already contractually committed to the Project Repayment Districts should the Project be completed. Under the short-term water-service contracts with petitioners, the Bureau provides

water only for so long as it is available and so long as their usage does not interfere with the rights of the Project Repayment Districts. The Bureau's response to this unique situation illustrates why Congress, in the 1939 Act, gave the Bureau the flexibility necessary to provide a more limited form of water service in this type of situation.[8]

The Bureau has informed this Office that, outside the Quincy Subarea, it uses short-term Section 9(e) contracts only in a few rare circumstances. Petitioners' contention (Pet. 31-35) that the question presented is one of broader significance for reclamation law therefore is incorrect. In the absence of a conflict with another appellate court— which could arise, for instance, in a case not seeking monetary relief under the Little Tucker Act and thus within the appellate jurisdiction of the appropriate regional court of appeals—further review is not warranted.

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[8] Indeed, if Section 9(e) did not allow the Bureau the flexibility to provide water for irrigation purposes without entering into a repayment contract that, once repaid, provides a permanent contractual right to Project water, it is unlikely that the Bureau would have entered into contracts with petitioners at all. The artificially stored groundwater to which petitioners would acquire a permanent right already had been promised to the Project Repayment Districts at the Project's unfinished southern portion. The interpretation that petitioners advance thus perversely could result in the Bureau declining to provide water to similarly situated farmers, even though it currently might be available.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT AND WILLIAMSON LAND CO.,

Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

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REPLY BRIEF FOR THE PETITIONERS

The petition accused the Government of asserting ownership of reclamation project water and using contracts with landowners to distribute that water in accordance with agency priorities rather than the principle of beneficial use established in the first Reclamation Act and repeatedly reaffirmed by Congress and this Court. Pet. 11. Rather than deny those charges, the Government has embraced them. It insists that it is not, in this Court's words, a "mere 'carrier and distributor'" of the water in the Columbia Basin Project, BIO 20 (quoting *Ickes v. Fox*, 300 U.S. 82, 95 (1937)), but rather "holds full legal title" to the waters it collects, BIO 17. As a consequence, the Government denies that landowners who put project water to beneficial use "inevitably obtain a permanent right to that water," even if they fully repay the Government their share of the construction costs of the project. BIO 13 n.6. Instead, the opportunity to obtain a permanent water right, to end payments for construction costs, and to obtain release from the Act's acreage limitations is a matter of bureaucratic grace – the Government will provide those benefits to some landowners by awarding them Section 9(d) contracts or Section 9(e) contracts with nominal terms of more than ten years, but may deny equal treatment to other similarly situated landowners through the simple expedient of limiting them to perpetually renewing ten-year Section 9(e) contracts.

Even worse, the Government also insists that it may use this power not only to deny landowners like petitioners the *benefits* of repayment contracts, but also to impose on them, as a matter of contract, all of

the *burdens* of repayment, including the Act's onerous acreage limitations, even if Congress chose not to impose those restrictions on petitioners under the terms of the statute. BIO 15-16.

The court of appeals' ratification of the Government's extravagant claims of authority, *see* Pet. App. 13a-15a, 25a-33a, is inconsistent with this Court's precedents, the text of the Reclamation Act, and the basic policies of reclamation law. At the same time, the Government's attempts to evade this Court's review of its overreaching are unconvincing. The principles at stake, and the consequences of leaving the decision below unreviewed, affect millions of acres of farmland throughout the West. This Court's intervention is required.

I. The Government Continues To Defy This Court's Reclamation Law Precedents.

1. This Court has repeatedly rejected the Government's claim that it owns Reclamation Act waters. *See* Pet. 12-19.[1] To be sure, the Act requires the Government to seek state approval of water appropriations before constructing a project. But "the Government's 'ownership' of the water rights [is] at most nominal; the beneficial interest in the rights confirmed to the Government reside[] in the owners

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[1] Contrary to the Government's assertion (BIO 16), petitioners repeatedly asserted below that the Government's position was incompatible with the Act's beneficial use provisions. *See* C.A. Appellants' Br. 21-22, 31; C.A. Reply Br. 9-13.

of the land within the Project to which these water rights bec[o]me appurtenant upon the application of Project water to the land." *Nevada v. United States*, 463 U.S. 110, 126 (1983).

Thus, it is the application of water to the land for beneficial use – not a discretionary contracting decision of the Bureau of Reclamation – that governs the distribution of project waters. *See, e.g., California v. United States*, 438 U.S. 645, 673, 677-79 (1978) (applying the beneficial use standard to a post-1939 project). The Government's contracting authority is limited to setting the terms under which the farmers who obtain a water right through beneficial use will pay their fair share of the cost of constructing the project. *See, e.g., Fox v. Ickes*, 137 F.2d 30, 33 (D.C. Cir. 1943).

Here, petitioners have put project water to beneficial use for decades.[2] There is no claim that

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[2] The Government asserts that petitioners do not own "project land" because the Bureau classified the Black Sands area as "non-irrigable," BIO 5 n.3, but makes no claim that anything in this case turns on that assertion (which it never made below) Nonetheless, the claim is false: in previous litigation with petitioners, the Government asserted that petitioners' lands were within the project, C.A. J.A. 321-323, ¶ 3.23; the irrigation agreements the Bureau drafted and imposed on petitioners recite that their lands are within the project, C.A. J.A. 294, ¶ 7.a., 301, ¶ b(2); the Bureau's year 2000 official cost allocation lists the 40,323 acres irrigated by artificially stored groundwater (the water used by petitioners) as being "in the project," C.A. J.A. 347; and the Bureau has never provided the statutorily required notice of any intent to remove petitioners' land from the project, *see* 43 U.S.C. § 419.

their water is needed by other farmers with earlier beneficial use claims. To the contrary, the Government insists only that petitioners' water may, someday, be wanted by others to whom the Bureau has given a *contractual* priority. BIO 14.[3] But, as this Court has repeatedly recognized, Congress withheld from the Bureau the authority to prioritize among agricultural water users. Which farmers are entitled to how much water and in what priority is decided by the traditional western water law principles of beneficial use and prior appropriation. *See, e.g, California v. United States*, 438 U.S. at 665. And as a consequence, the most the Bureau could lawfully promise to any irrigation district was the amount of water its landowners actually put to beneficial use (subject to the Act's acreage limitations) prior to petitioners' appropriations.

2. The Government attempts to distinguish this Court's precedents in three ways, none of which is convincing. First, it states that "none of those cases involved groundwater," BIO 19-20, without any hint as to why that makes any legal difference.

Second, the Government claims that the Court rejected the United States' ownership claims in prior

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[3] The Government claims that petitioners' water "*could* be needed" by other project landowners "[s]hould the Bureau finish the Project." BIO 14 (emphasis added). But the remaining canals have been "unfinished" since the 1940s. BIO 3. Moreover, the Bureau holds water rights sufficient for future project uses as well as petitioners' project lands. *See* C.A. J.A. 682, ¶2; C.A. Appellants Br. 7; C.A. Reply Br. 16 & n.43.

cases not because the landowners had put the water to beneficial use, but because the Government had given the landowners a contractual right to the water. BIO 20. But one need only read the Court's opinions to discern that beneficial use was the basis of the decisions. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) ("The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use."); *Nevada v. United States*, 463 U.S. at 126 (explaining that "the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land").

Third, the Government argues that this case is different because Washington State gave the United States "full legal title" to the water, BIO 17, to distribute within the project without regard to beneficial use, BIO 16-19. That is both untrue and irrelevant. As this Court has observed, in "the state of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use." *Ickes*, 300 U.S. at 95; *see also Lawrence v. Southard*, 192 Wash. 287, 300 (1937) (same); *Neubert v. Yakima-Teiton Irrigation Dist.*, 117 Wash.2d 232, 237 (1991) (same).[4]

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[4] The regulations the Government cites (BIO 18-19) are not to the contrary. Instead, they simply require petitioners to comply with any *valid* conditions imposed in their contracts and

And, in any event, the Reclamation Act is perfectly clear that state law controls the distribution of project water only so long as it is consistent with the Act's beneficial use requirement. *See* 43 U.S.C. § 372; *California v. United States*, 438 U.S. at 668 n.21. Accordingly, Washington permitting officials had no authority to relieve the Bureau of its statutorily designated role as "simply a carrier and distributor of the water," *Ickes*, 300 U.S. at 95, or to displace beneficial use, in favor of bureaucratic contracting discretion, as "the basis" of reclamation water rights, 43 U.S.C. § 372.

II. Nothing In The 1939 Or 1956 Acts Made The Government Owner Of Project Water.

The Government nonetheless argues that Congress fundamentally changed reclamation law in 1939, when it authorized Section 9(e) contracts, and again in 1956, when it enacted specific protections for long-term Section 9(e) contracts. BIO 10-15. That is incorrect as well.

1. If Congress had intended such a monumental shift in western water policy, one would have expected it to say so clearly. Instead, Congress declared that the 1939 Act was simply intended to establish "a feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payments of construction charges," 43 U.S.C. § 485, not to eliminate repayment

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not to interfere with the delivery of water to which others have a *lawful* prior right.

of construction charges altogether for some landowners or repeal the beneficial use provision of the 1902 Act, 43 U.S.C. § 372.

Nor has the Government identified any compelling textual evidence of a radical shift in policy in 1939. It points to the fact that Section 9(e) does not require repayment of construction costs "*in full* over a preset period of years." BIO 10. But the statutory definition of "repayment contract" simply requires a contract "providing for payment" – not *full* payment – "of construction charges to the United States" without any reference to the time period during which repayment occurs. 43 U.S.C. § 485a(e).[5] Moreover, the statutory benefits petitioners claim require only that repayment be *accomplished*, and do not turn on how long repayment takes or whether the original contract established a "preset period." *See, e.g.*, 43 U.S.C. § 390mm (acreage and pricing limitations "shall not apply to lands . . . after the obligation . . . for the repayment of the construction costs . . . shall have been discharged"); 43 U.S.C. § 431 (providing for permanent water right when "all payments therefor are made" for equitably apportioned construction costs, 43 U.S.C. § 461).

Accordingly, under the 1939 Act, so long as landowners pay their share of operation and maintenance expenses and construction costs, they

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[5] The Government does not dispute that over time, petitioners will have paid their fair share of construction costs "in full" like any other project landowner (none of whom pays the full actual cost of construction). *See* Pet. 7.

are entitled to the benefits of repayment regardless of the form of their contract.

2. Likewise, nothing in the 1956 Act can be read to impliedly repeal longstanding law that entitled petitioners to obtain a water right through the beneficial use of project waters. Pet. 23-24. The amendments expressly reaffirmed that "beneficial use" continued to be the "basis, the measure, and the limit" of water rights under the Act. 43 U.S.C. § 485h-4. Thus, Congress hardly "acquiesced," BIO 11, in any Bureau attempt to use its Section 9(e) authority to arrogate to itself full title to project water and the right to determine its distribution. Rather, the amendments *restricted* agency discretion in response to the Bureau's misuse of its Section 9(e) powers. Pet. 25.

It is therefore unsurprising that even after the 1956 Act, this Court still viewed Section 9(e) contracts as simply another mechanism to recoup the costs of reclamation projects over time. *See Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 286 (1958) (referring to Section 9(e) contracts as providing for "[r]epayment, without interest" of construction costs for "water supply facilities").

The Government argues that by providing express protections for long-term Section 9(e) contracts, Section 485h-1 necessarily implies that short-term Section 9(e) contracts do not convey water rights or any other repayment entitlements. BIO 12-13. But that implication is hardly necessary – the statute elsewhere specifically contemplates a non-renewable ten-year "development period" during the construction of a project, which Congress likely had

in mind when it limited Section 485h-1 to contracts with terms of more than ten years. *See* 43 U.S.C. §§ 485f(b), 485h(d)(1). And in any case, any negative inference is insufficient to overcome the amendments' specific reaffirmation of the beneficial use principle. *Id.* § 485h-4. Instead, Congress's failure to address the rights of short-term Section 9(e) contract holders simply left those landowners in the same position they were in before the amendments. Any assumptions the 1956 Congress may have had about short-term 9(e) contracts were not enacted into law and therefore have no legal significance. Pet. 23-24.

3. Even if the Court were to conclude that the 1956 Act necessarily implied a limited exception from ordinary reclamation law principles for short-term Section 9(e) contracts, that exception should be narrowly construed to mitigate the conflict with the amendments' simultaneous reaffirmation of the beneficial use principle. Accepting the Government's construction of "long-term contract," on the other hand, would permit the exception to swallow the rule, allowing the Government to evade the restrictions of the 1956 Act by simply limiting landowners to perpetually renewing contracts with nominal ten-year terms. There would be no point in enacting Section 485h-1 if Congress intended to allow the Bureau discretion to circumvent the provision with the stroke of a pen.

Petitioners' construction, on the other hand, accords due respect to both the text of the statute and nearly 100 years of reclamation law: a contract has a term of more than ten years (and therefore is a "long-term contract" for purposes of Section 485h-1, *see* 43

U.S.C. § 485h-3), if the contract on its face permits continued enforcement for more than ten years and the contract has in fact persisted without significant alteration for more than a decade. *See* Pet. 27. This understanding accords with the statute's purposes – it withholds the benefits of Section 485h-1 from any Section 9(e) contract that lasts less than ten years, but if the contractual relationship persists beyond that, the Government must treat the landowner on par with others who have made similar long-term payments and investments in their lands in reliance on the availability of project water.

III. The Government's Misapprehension Of Its Authority, Ratified By The Federal Circuit, Warrants Review.

1. The Government argues that even if it has overstepped its authority, review is not warranted because short-term Section 9(e) contracts are relatively uncommon. BIO 21. *But cf.*, *e.g.*, *Ickes*, 300 U.S. at 87-88 (deciding question directly affecting only a single reclamation project). That argument misapprehends the scope of the Government's assertion of authority, the breadth of the decision below, and the consequences both have for landowners throughout the West.

The Government's assertion that it owns the water it distributes through Section 9(e) contracts is not limited to short-term contracts. *See* BIO 16-19. Likewise, the court of appeals' conclusion that Section 9(e) contracts are utility-type contracts with no repayment rights applies equally to short- and long-term contracts. Pet. App. 13a. As the amicus

brief of the San Louis and Delta-Mendota Water Authority, et al. explains, that holding threatens the status of many thousands of Section 9(e) contract farms in California and beyond. *See* Amicus Br. 10 (explaining that the court of appeals' decision "will raise uncertainty for all Section 9(e) contract holders in a way that can only exacerbate the economic and social distress currently plaguing California's Central Valley"); *see also Arizona v. California*, 460 U.S. 605, 620 (1983) (stressing importance of water rights certainty).

The Government implies that long-term contract holders need not worry because they are given significant rights under the 1956 amendments. BIO 21. But the most significant rights are available only upon "terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(1); *see also id.* § 485h-1(2). And none is available if, upon expiration of a long-term Section 9(e) contract, the Bureau insists on offering the landowner the same renewing ten-year contract imposed upon petitioners. *Cf.*, *e.g.*, Northern California Water Rights Assoc., *Sacramento Valley Central Valley Project Water Service Contracts*, *available at* http://www.norcalwater.org/waterrights/cvp_contracts.shtml (noting that when certain long-term Section 9(e) contracts expired in 1995, the Bureau initially offered "a series of interim renewal contracts" with terms ranging "from 3 years to as little as 9 months, causing significant uncertainty and expense"). Likewise, until corrected, nothing prevents the Government, emboldened by the decision below, from limiting future reclamation project water users to the same kind of contracts

imposed on petitioners in this case in order to grant a preference to some landowners over others.

Nor does the Government deny that the decision below will have collateral consequences for changes in the use of project water (*see* Amicus Br. 17-18), the operation of the Takings Clause (Pet. 34), and application of statutes like the Endangered Species Act (*id.*).

2. The Government's final suggestion that the Court should stay its hand pending the development of a circuit conflict, BIO 33, is misplaced.

First, a conflict already exists over whether the Government can deprive landowners of a permanent right to beneficially used water through water utility contracts. *Compare* Pet. App. 13a-15a, 25a-33a *with Fox v. Ickes*, 137 F.2d at 33 ("The water-rights of appellants are not determined by contract but by beneficial use.") *and Lawrence*, 192 Wash. at 300 (same).

Second, the Government does not dispute that Reclamation Act questions arise in only a handful of western states. *See* Pet. 35; *see also* BIO 21 (asserting that the short-term contracts are rare outside Washington State); BIO 18 (arguing that, consistent with the decision below, the Ninth Circuit has already decided that the Bureau owns reclamation project waters). As a result, there is no point in waiting for the views of other circuits that likely will never have occasion to decide the questions presented here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 10-116

In the

Supreme Court of the United States

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT, et al.,
Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICI CURIAE OF SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, WESTLANDS WATER DISTRICT, AND SAN LUIS WATER DISTRICT IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Federal reclamation law governs the rights and responsibilities of landowners receiving water for irrigation from federal reclamation projects under contracts with the Bureau of Reclamation. *See generally* 43 U.S.C. §§ 371 *et seq*. It has long been a principle of reclamation law that "the Government's 'ownership' of the water rights" in project water is "at most nominal; the beneficial interest in the rights confirmed to the Government reside[s] in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Nevada v. United States*, 463 U.S. 110, 126 (1983). As a consequence, once landowners fulfill their contractual obligation to repay the cost of constructing the project works, they obtain a permanent water right and other important entitlements under reclamation law. *See* 43 U.S.C. §§ 372, 390mm, 431, 541. The question presented is:

Whether the Government may deprive landowners of the ability to acquire a permanent water right and other reclamation law entitlements by limiting landowners to perpetually extending ten-year "water utility" contracts under 43 U.S.C. § 485(e).

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The San Luis & Delta-Mendota Water Authority ("Water Authority"), Westlands Water District ("Westlands") and San Luis Water District ("San Luis") respectfully submit this brief *amici curiae* in support of the petition for writ of certiorari filed by Grant County Black Sands Irrigation District and Williamson Land Company.[1]

INTEREST OF *AMICI CURIAE*

The issues presented in this case, dealing with the interpretation and application of water contracts executed under 43 U.S.C. § 485h(e) (Section 9(e) contracts), are critically important to entities throughout the Western United States that contract with the United States for water from federal reclamation projects. The Federal Circuit's decision considers whether Reclamation must afford the benefits of Section 9(d) and long-term Section 9(e) contracts to those who have short-term Section 9(e) contracts. Pet. App. 9a. In holding that short-term Section 9(e) contracts enjoy few if any of the benefits accorded Section 9(d) and long-term Section 9(e) contracts, the Federal Circuit made a number of characterizations of Section 9(e) contracts generally that are inconsistent with federal reclamation law and threaten substantially to undercut Section 9(e)

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[1] Pursuant to Supreme Court Rule 37, Amici Curiae state that counsel for both parties have consented in writing to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice of the intent of the Amici to file a brief at least ten days prior to the brief's filing. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than Amici, made a monetary contribution to its preparation.

contract holders' rights. Among these entities are Amici, which contract or represent interests that contract for water developed by the federal Central Valley Project (CVP), the largest federal reclamation project located within the State of California.

The United States Department of the Interior's Bureau of Reclamation ("Reclamation") owns the CVP, which brings water from areas of California where supply is plentiful but demand low, to regions where demand is great but supplies lacking. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-29 (1950). The CVP was originally conceived as a State of California project. Because of the Great Depression, the State was unable to finance the project. Most of the water development envisioned by the State was accomplished by the federal CVP, beginning with the project's initial authorization in 1935. Work began on the CVP in 1937 and its last major facility was completed in 1979. *See State Water Resources Control Board Cases*, 136 Cal. App. 4th 674, 691-92 (2006). The CVP is comprised of 20 dams and reservoirs, 11 powerplants, and 500 miles of major canals as well as conduits, tunnels, and related facilities. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 943 (9th Cir. 2002); *see also* U.S. Bureau of Reclamation, *The CVP Today*, *available at* www.usbr.gov/mp/cvp/about.html (last visited Aug. 19, 2010). CVP water is now used by hundreds of long-term Section 9(e) contractors that put the water to agricultural use on thousands of farms covering millions of acres. *See State Water Resources Control Board Cases*, 136 Cal. App. 4th at 692.

The Water Authority, formed in 1992 under California law as a joint powers authority, consists of

twenty nine public agencies, twenty seven of which contract with Reclamation for CVP water. Twenty two of the Water Authority's member agencies hold long-term Section 9(e) contracts. Reclamation conveys CVP water available under those long-term Section 9(e) contracts primarily through the Sacramento-San Joaquin River Delta ("Delta") region of California. As required by Section 105 of Public Law 99-546, 100 Stat. 3051-52, each of the Section 9(e) contracts held by the Water Authority's member agencies includes a provision to ensure Reclamation recovers the capital investment in the CVP by the year 2030.

CVP water made available to the Water Authority's member agencies supports approximately 1.2 million acres of agricultural lands, as well as 51,500 acres of private waterfowl habitat, in California's Central Valley. The member agencies' CVP water also supplies municipal and industrial uses in Silicon valley, as well as 1 million townfolk in the Silicon Valley and the Central Valley.

Westlands and San Luis, members of the Water Authority, are California water districts formed pursuant to California Water Code section 34000, *et seq.* Westlands and San Luis use CVP water for irrigation of approximately 550,000 acres on the west side of the Central Valley in Fresno, Kings, and Merced Counties, California, as well as for municipal and industrial purposes within those counties. Farmers within Westlands and San Luis produce more than 60 high-quality commercial food and fiber crops sold for the fresh, dry, canned, and frozen food markets, both domestic and export. More than 50,000 people live and work in the communities that are

dependent on the water supply available to Westlands and San Luis, and the agricultural economy resulting therefrom, based on existing Section 9(e) water contracts.

The Federal Circuit's decision, which analyzes the rights of all contracts executed pursuant to Sections 9(e) and 9(d), 43 U.S.C. § 485h(d), thus creates grave and serious implications to federal water contract holders throughout the West.

SUMMARY OF ARGUMENT

It is a longstanding principle of reclamation law that "the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project." *Nevada v. United States*, 463 U.S. 110, 126 (1983). In this case, the Federal Circuit violated that principle, allowing Reclamation to assume the role of a "water utility" provider. In so doing, the Federal Circuit has created uncertainty over important rights accorded under reclamation law to holders of Section 9(e) contracts, such as Amici and those they represent.

In the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, as amended, 43 U.S.C. § 371, *et seq.*, Congress authorized Reclamation to enter into contracts with water users whereby the federal government would construct the works and deliver the water, and the water users would pay for the water and the construction costs over a set term. Once the construction costs had been paid, certain conditions on the use of water developed by a federal reclamation project would be lifted and the contractors would obtain permanents right to their share of the project's water yield. Owing to the Great Depression, however,

many water users were unable to pay off the construction charges.

Hence, in the Reclamation Project Act of 1939, Pub. L. No. 76-260, 53 Stat. 1187, *codified at* 43 U.S.C. § 485h(e), Congress restructured the 1902 Act's repayment-type contracts to permit greater flexibility in the repayment period, while still allowing for the transfer of ownership. These contracts became known as "Section 9(d)" contracts. Also in the 1939 Act, Congress created a new type of contract, the Section 9(e) contract, which allowed water users to contract for water with Reclamation even when the total construction cost (to be passed on to the water users) was not yet known. Section 9(e) contracts came in two types: short-term (with a contractual period of ten years or less) and long-term (with a contractual period of more than ten years). In the years following the 1939 Act's passage, confusion emerged regarding whether and to what extent a Section 9(e) water contract provided the same benefits as a Section 9(d) contract.

To disperse this confusion and allay the fears of water users, Congress passed the Reclamation Act of 1956, Pub. L. No. 84-643, 70 Stat. 483, *codified at* 43 U.S.C. §§ 485h-1 to 485h-6, the clear intent of which was to reject Reclamation's efforts to use Section 9(e) contracts to preclude water users from repaying construction costs and obtaining a permanent right to project water. But the Federal Circuit's decision threatens radically to upset the common understanding of the rights of Section 9(e) contract holders established by the 1956 Act, for several reasons.

First, the Federal Circuit's analysis contains unjustifiably broad statements that purport to minimize the rights of long-term Section 9(e) contracts. Perhaps most importantly, the court's decision refers to Section 9(e) contracts as "merely . . . contract[s] to receive project water." Pet. App. 13a, 17a. In so doing, the decision raises significant doubt as to whether long-term Section 9(e) contract holders have a permanent right to obtain the water developed by a federal reclamation project once the project's construction costs have been paid.

To interpret a Section 9(e) contract as solely a contract to receive project water is entirely inconsistent with the purpose of the 1956 Act namely, to make clear that long-term Section 9(e) contractors have the obligation to pay a rate component for construction costs, as well as a right to have their capital payments credited against their obligation to repay such costs. 43 U.S.C. § 485h-1(6). The Act also provides long-term Section 9(e) contractors with the right to enter into a Section 9(d) contract, with credit for payments made, "at such time as the . . . remaining amount of construction cost which is properly assignable for ultimate return by it can probably be repaid to the United States within the term of a contract under said subsection (d)." *Id.* § 485h-1(2). This requires, for the CVP at least, a determination that the project is complete so that the portion relative to irrigation assignable to each contractor is capable of calculation. *Id.* Most critically, contractors under both Section 9(d) and (e) contracts have the same rights to crediting of capital payments and for establishing a right to a fixed share of the "project's available water supply for . . . irrigable lands." *Id.* § 485h-1(3)-(4). But the Federal Circuit's determination that Section 9(e) contractors do

not have repayment contracts because they are not required to repay construction costs is simply not reconcilable with the 1956 Act.

In fact, the 1956 Act repeatably characterizes repayment contracts as available under both Sections 9(d) and 9(e). *See, e.g.*, 43 U.S.C. § 485h(e) ("In lieu of entering into a repayment contract pursuant to the provisions of subsection (d)); 43 U.S.C. § 485f(b) ("repayment contract . . . in accordance, as near as may be, with the provisions [of sections 9(d) or 9(e)]"). Strangely enough, the Federal Circuit's decision recognizes that Congress passed the 1956 Act with the express purpose of assuaging water users fears that, without legislative action, Reclamation would treat long-term Section 9(e) contracts as just "utility" contracts containing no assurances to permanent water rights. Pet. App. 15a-16a. Yet, the Federal Circuit's decision creates those fears anew by casting Section 9(e) contracts as qualitatively different from and inferior to Section 9(d) contracts.

Second, the Federal Circuit's decision compounds the fears of those who have Section 9(e) contracts by holding that such contracts do not encompass "construction charges" and cannot, for that reason, enjoy the benefits of a Section 9(d) repayment contract under the 1939 and 1956 Acts. The court's discounting of the significant construction charges that all Section 9(e) contract holders pay not only subverts the 1956 Act's ameliorative purpose, it threatens to nullify Section 9(e) contract holders' substantial, multi-year payments intended specifically to repay the costs of Reclamation projects.

Third, the significant uncertainty that the Federal Circuit's decision creates for all Section 9(e) contract

holders does not stop with federal reclamation law. State water law provides protections to water users, protections that, in the case of a federal reclamation project, are contingent upon the rights accorded under contracts executed pursuant to Sections 9(d) and 9(e). The Federal Circuit's decision, because it could be interpreted to undermine existing rights held by Section 9(e) contractors, might also undermine existing protections under state law and thus have devastating impacts to Amici and the interests they represent.

Given the large amounts of reclamation water delivered pursuant to long-term Section 9(e) contracts for agricultural, domestic, and industrial uses throughout the West (and particularly in California), and the critical imperative of having a sure and sound right to that water, the Federal Circuit's decision interpreting the rights and obligations of Section 9(e) contract holders merits review in this Court.

REASONS FOR GRANTING THE WRIT

I

THE FEDERAL CIRCUIT'S DECISION WILL HAVE NATIONWIDE IMPACT

Shortly after Congress passed the 1956 Act to allay water-users' concerns regarding Reclamation's misuse of Section 9(e) contracts, this Court granted certiorari in *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958), to determine the rights of would-be Section 9(e) contract holders in California's Central Valley. In its opinion, the Court observed:

> As to the rights and duties of the United States under the [Section 9(e)] contracts, these are matters of federal law on which

> this Court has final word. Our construction of the contract might dispel any features thereof found offensive.

Id. at 289 (citation omitted).

More than half a century later, the matters now before the Court on writ of certiorari are of capital significance to thousands of California farmers, water users, and countless others throughout the Nation that reap the benefit of the Central Valley's productivity. The stakes could not be higher. While the water woes present in California in the 1950s were no doubt serious, *see Ivanhoe Irrigation Dist. v. All Parties & Persons, etc.*, 350 P.2d 69, 76-77 (Cal. 1960), they pale in comparison to today's troubles.

In ongoing litigation challenging water delivery restrictions to the Central Valley purportedly required by the Endangered Species Act, 16 U.S.C. §§ 1531-1544, Judge Wanger of the Eastern District of California has repeatedly noted the serious impacts of water shortages on the people of the Central Valley. *See generally Consol. Delta Smelt Cases*, 2010 U.S. Dist. LEXIS 62006, at *94-*109 (E.D. Cal. May 27, 2010). For example, the court has found that current water delivery cutbacks could cause or have already caused: (1) a loss of urban water supply sufficient to meet the annual needs of 2.6 million people, *id.* at *99; (2) a loss of almond production of 140,000 acres, *id.* at *99-*100; (3) an increased reliance on permanent crops, which puts farmers at greater economic risk than row crops, *id.* at *101; (4) a sharp increase in the percentage of land left fallow, leading to an increase in dust and particulate matter and a concomitant reduction in air quality, *id.* at *102; (5) losses of thousands of agricultural jobs, and reductions in farm

workers' wages, *id.* at *103-*04; and (6) significant increases in groundwater pumping (potentially leading to overdraft), requiring increased energy, and causing land subsidence, *id.* at *105-*06—all of which have led the court to conclude that "the harms [caused by water shortages] to the affected human communities [are] great." *Id.* at *148. Added to this continuing socio-economic turmoil is the Federal Circuit's decision, which could be interpreted to undercut the expectations of Section 9(e) contract holders, the same contract holders who must supply the beleaguered farmers and townsfolk of the Central Valley with water.

Below, Amici explain how the Federal Circuit's decision will raise uncertainty for all Section 9(e) contract holders in a way that can only exacerbate the economic and social distress currently plaguing California's Central Valley.

A. The Federal Circuit's Decision Unjustifiably Treats All Section 9(e) Contracts Alike, and Improperly Characterizes the Obligations of Section 9(e) Contract Holders

The principal issue addressed by the Federal Circuit's decision is whether Reclamation must afford the benefits of Section 9(d) and long-term Section 9(e) contracts to those who have short-term Section 9(e) contracts. Pet. App. 9a. In holding that short-term Section 9(e) contracts enjoy few if any of the benefits accorded Section 9(d) and long-term Section 9(e) contracts, the Federal Circuit made a number of characterizations of Section 9(e) contracts generally that are inconsistent with federal reclamation law and

threaten substantially to undercut Section 9(e) contract holders' rights.

The first and most serious error made by the Federal Circuit is its description of a Section 9(e) contract as "merely a contract to receive project water." Pet. App. 13a, 17a. In its attempt to differentiate Section 9(e) contracts from Section 9(d) contracts, the Federal Circuit expressed the view that:

> The 1956 Act merely made it "possible for the Secretary of the Interior in approving so-called 'water service' and 'utility type' contracts to meet objections" of the landowners with respect to renewability, crediting, and permanent water rights. Thus, 9(e) contracts continued to be treated as "water service" or "utility-type" contracts, distinct from 9(d) contracts and the repayment-type contracts envisioned by the 1902 Act.

Pet. App. 17a (citation omitted; emphasis added).

Although the Federal Circuit apparently recognized that the 1956 Act was intended to reject the proposition that Section 9(e) contracts are mere water-service contracts, the court's decision nevertheless repeatedly refers to Section 9(e) contracts generally as "water service" or "utility-type contracts." Without doubt, Section 9(d) contracts are different from Section 9(e) contracts, but the Federal Circuit's devaluation of all Section 9(e) contracts is simply without basis or precedent.

For example, the Federal Circuit stated that, "[u]nder a 9(e) contract, by contrast, the landowner assumes liability only for a variable annual charge for

the delivery of irrigation water." Pet. App. 24a (emphasis added). The assertion is plainly incorrect: Section 9(e) contracts can and often do assume liability for much more than a variable annual charge for the delivery of irrigation water. Indeed, under the 1956 Act, Reclamation can assign a fixed charge for capital costs (distinct from operation and maintenance costs). *See* 43 U.S.C. § 485h(e).

In fact, in accordance with the CVP Irrigation Ratesetting Policy, approved by Reclamation in 1988, Section 9(e) contractors within the CVP, including Amici Westlands, San Luis, and others represented by Amicus Water Authority, pay water rates that contain components designated by Reclamation as "operation and maintenance" and "capital" costs, the latter comprised primarily of the costs of construction.

Moreover, federal law governing the CVP requires CVP Section 9(e) contractors to pay capital construction costs. As noted above, Section 104 of Public Law 99-546 (Oct. 27, 1986), provides:

> The Secretary of the Interior shall include in all new or amended contracts for the delivery of water from the Central Valley Project a provision providing for the automatic adjustment of rates by the Secretary of Interior if it is found that the rate in effect may not be adequate to recover the appropriate share of the existing Federal investment in the project by the year 2030.

Reclamation's policy and federal law omit any distinction between Section 9(e) and Section 9(d) in the requirement that the investments—the capital

construction costs—of the federal government be repaid through contract rates.

Thus, within the CVP, no statute differentiates between those costs appropriated through a Section 9(e) contract (whatever its term length) and any other Reclamation water contract.[2]

B. The Federal Circuit's Decision Gravely Mischaracterizes the Nature of the Payments Made by Both Short- and Long-Term Section 9(e) Contract Holders

The Federal Circuit's decision concludes that Section 9(e) contracts do not require the payment of construction charges and, for that reason, do not merit the benefits conferred by Section 9(d) contracts. Pet. App. 25a-26a, 33a. In reaching that conclusion, the Federal Circuit failed to recognize that Section 9(e) contracts can and do include capital cost components similar or in some cases identical to cost components in Section 9(d) contracts.

The court also afforded too much significance to how a Section 9(d) contract, as opposed to a Section 9(e) contract, incorporates a general obligation to repay construction costs. For example, the decision observes that the "1939 Act expressly states that 9(d) repayment contracts include a "general repayment

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[2] Further, the Federal Circuit's statement that the holder of a Section 9(e) contract "assumes liability for only a variable annual charge" cannot be reconciled with the court's characterization of the 1956 Act's purpose to confer the right to "cease paying the 'construction component' of the total use charge when the payments in excess of the government's operation and maintenance charge equaled the construction cost of the project." Pet. App. 16a.

obligation." Pet. App. 27a. True enough, but the statutory benefits that Section 9(d) contracts enjoy derive from their being "repayment contracts." *See* 43 U.S.C. §§ 485h(e), 485h(d). It is of course reasonable to conclude that contracts containing a "general repayment obligation," like those executed under Section 9(d), should be categorized as "repayment contracts." But it does not follow that *only* such contracts should be so characterized, especially where contracts executed under Section 9(e) require the payment of "an appropriate share of such fixed charges" that Reclamation deems necessary to pay for "that part of the cost of construction of works connected with water supply and allocated to irrigation." 43 U.S.C. § 485h(e). This charge, practically speaking, amounts to the same thing as a general repayment obligation.[3]

A "repayment contract" is defined as "any contract providing for payment of construction charges to the United States." 43 U.S.C. § 485a(e). In turn, "construction charges" are defined as "the amounts of principal obligations payable to the United States." *Id.* § 485a(d). It is undisputed that Section 9(e) contracts of all stripes contemplate payment of construction charges. Yet the Federal Circuit held that, although construction costs paid to Reclamation under the rubric of Section 9(d)'s "general repayment obligation" are cognizable as "construction costs" for a "repayment

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[3] Reclamation law also expressly refers to Section 9(e) contracts as a species of repayment contract. *See, e.g.*, 43 U.S.C. § 485f(b) ("For any project . . . in connection with which a repayment contract has not been executed, . . . a repayment contract may be negotiated, in the discretion of the Secretary, . . . in accordance, as near as may be, with the provisions in subsection 9(d) or *9(e)* of this Act.") (emphasis added).

contract," construction charges that are paid to Reclamation by virtue of Section 9(e)'s "fixed charges" obligation are not "construction costs" paid pursuant to a "repayment contract." Thus, the Federal Circuit's decision could be interpreted to afford substantial benefits to one class of water contract holders but to deny those same benefits to another class of water contract holders, even though Reclamation receives the same benefits and the contract holders incur the same obligations. Such a result would not only be unjust, but, for the reasons noted above, would run counter to the CVP Irrigation Ratesetting Policy and Public Law 99-546. The mechanism for collecting such costs is more on the order of utility-type charges, but these charges nevertheless comprise the repayment of construction costs and fit within the statutory definition of repayment contracts. In multi-facility projects like the CVP, a fixed repayment obligation has not been found capable of calculation due to ongoing constructions activities, and rates under Section 9(e) contracts have provided the practical resolution to the recapture of the federal investment.

* * * * *

If left to stand, the Federal Circuit's ruling could be interpreted in a manner that deprives Section 9(e) contractors of important rights currently afforded them under federal reclamation law, a result that would cause instability in an already troubled region that, for now at least, produces a significant percentage of this country's food supply. *See Latino Issues Forum v. EPA*, 558 F.3d 936, 949 (9th Cir. 2009) ("The San Joaquin Valley is one of the nation's top producing agricultural areas, sometimes referenced as 'the nation's salad bowl"); *see also Tehama-Colusa Canal Auth. v. United*

States DOI, 2010 U.S. Dist. LEXIS 64213, at *4 (E.D. Cal. June 28, 2010). The court's decision not only threatens the water rights of Amici and those they represent, it also raises the specter of a significant injustice, by suggesting that Reclamation is authorized to charge Amici, those they represent, and others for the cost of a benefit that they will never receive.

II

THE FEDERAL CIRCUIT'S DECISION CREATES MUCH UNCERTAINTY FOR FEDERAL WATER CONTRACT HOLDERS, PARTICULARLY IN CALIFORNIA, BY INCREASING THE RISK THAT THESE CONTRACT HOLDERS WILL LOSE IMPORTANT RIGHTS UNDER STATE LAW

"Certainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. 605, 620 (1983). The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the acquisition and use of water rights. *Id.* Having a clear statement of the rights of Section 9(e) contract holders is especially important in California, because the state's application and determination of water remedies involving the CVP is contingent upon federal law.

For example, California has codified a common law "no injury" rule, whereby a water user is permitted to change use so long as the change does not injure other water users' rights of use. *See* Cal. Water Code §§ 1702, 1706, 1707, 1725, 1736; *Kidd v. Laird*, 15 Cal. 161, 181 (1860) ("[I]n all cases the effect of the change upon the rights of others is the controlling consideration, and that in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper."). Under California's articulation of the "no injury" rule, only those "others" who had "rights" to the water involved can claim "injury," and these can show "injury" only by demonstrating an injurious effect on their "rights" to the water involved in the change.

Unlike other states, California has determined as a matter of law that users of CVP water are contemplated to have "rights" within the scope of the "no injury" rule. In the seminal *State Water Resources Control Board Cases*, 136 Cal. App. 4th 674 (2006), the California court of appeal held that the "no injury" rule applied "to all "legal user[s] of the water involved" in the change request, including those who lawfully use water under contract with the appropriator." *Id.* at 805. In other words, California gives protection to Section 9(e) water users because these users have a "right" to their water. The Federal Circuit's decision, characterizing Section 9(e) contracts as the disfavored cousins of Section 9(d) contracts and arguably defining the rights of Section 9(e) contract holders as mere recipients of water service, obfuscates the true rights accorded by the 1956 Act, rights that include, upon repayment of construction costs, a permanent right to water that is protected by the "no injury" rule. The ambiguity caused by such a strained interpretation

could undermine the protections accorded under state law to Section 9(e) contractors. Until now, there was no ambiguity in the law—these contract holders could rely on the salutary effects of the "no injury" rule to keep other waters users from harming their interests.

Thus, because the Federal Circuit's decision could be read as depriving all Section 9(e) contract holders of the power to acquire water rights from Reclamation, it could complicate and interfere with water users' erstwhile rights under state law. If that were the result, the adverse impacts of the Federal Circuit's decision would be felt in a particularly harmful way by Section 9(e) contract holders in California, among them the Amici, as well as those they represent.

CONCLUSION

For decades, this Court has resolved important questions of water rights. As water becomes scarcer and demand increases, the long-term certainty of water provided by Reclamation is of paramount import not only to Amici and their respective members but also to vast numbers of Americans who benefit from the use of Reclamation water. Whether it is through the immense economic development made possible by Reclamation water, or the everyday necessity of food, millions of people can be affected by a decision creating uncertainty in the long-term water rights of Reclamation water. The Federal Circuit's decision needlessly and wrongfully creates this injurious

uncertainty. Amici urge the Court to grant the petition for writ of certiorari.

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Respectfully submitted,

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